MUNICIPAL BOARD DECISIONS

VOLUME SIX-A/1987

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

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From September 14, 1987

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Until September 14, 1987
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July 1, to December 31, 1987
ELIZABETH SALTON
September 15, to December 31, 1987

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THIS VOLUME CONTAINS ALL ASSESSMENT DECISIONS FROM JANUARY 1, 1987, TO DECEMBER 1, 1987.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

91-00631/

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THIS VOLUME OF THE 1987 DECISIONS OF THE NOVA SCOTIA MUNICIPAL BOARD CONTAINS HEADNOTES WHICH SUMMARIZE THE DECISIONS. THESE HEADNOTES ARE NOT PART OF THE DECISIONS. THE MUNICIPAL BOARD WHILE IT HAS AUTHORIZED AND APPROVED OF THE PUBLICATION OF THESE HEADNOTES ASSUMES NO RESPONSIBILITY FOR THE CONTENT OR THE ACCURACY OF THE HEADNOTES.

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This is an appeal by I.B. from a decision of the Halifax City Regional Assessment Appeal Court concerning her business occupancy assessment for her use of a second-floor room at the corner of Barrington and Blowers Streets as a professional artist's studio. The Director and the City objected to the jurisdiction of the Board because, inter alia, the Appellant had not served her landlord with a Notice of Appeal.

HELD: The appeal is dismissed, without costs. The Board lacks jurisdiction to hear the appeal.

To have her appeal heard on its merits, the first hurdle the Appellant must successfully jump is the requirement for service in s.100(1) of the Assessment Act. Within 30 days of delivery of the Regional Assessment Appeal Court decision to her, she must serve a copy of the notice of appeal upon the clerk of the municipality in which the property is situate, the Director and the person in whose name the property is assessed if she is not that person. If the word "property" in the last requirement means the land and buildings assessed to the Appellant's landlord then this requirement is not met; if "property" in the context of this section means the "business occupancy assessment being appealed", this person is herself and she would be excluded from this service requirement. In analyzing the meaning of the word "property" here it is of value to go to the use of the same word (and similar concepts) in the same statute with particular reference to the definition section of the statute. As a result of this analysis, the Board concludes the Assessment Act makes a clear distinction between the two words/concepts of "property" and "occupancy assessments." It was necessary for the Appellant to serve her landlord in order fully to comply with the service provisions of s.100(1). The Board has invariably held that the failure to serve any of the persons listed in s.100(1), regardless of the injury to the appellant, was fatal to the jurisdiction of the Board. A taxpayer in appealing to the Regional Assessment Appeal Court need serve the notice of appeal in writing on one person, the Recorder. To appeal from there to this Board requires service of notices of appeal on at least three times more people. This indicates an intent to make it much more difficult for an unrepresented taxpayer appellant to appeal to the Board. The process of notification used at the Regional Assessment Appeal Court level seems to the Board to address fully the public policy requirements for, on one hand, easy and fair access to the assessment process, and on the other, full knowledge of appeals to all interested public governing bodies. The Appellant also did not file her Notice of Appeal within 30 days, but it is not necessary for the Board to determine in this case whether this failure is fatal to her right of appeal.

NSMB-143-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An appeal by **ILZE BERZINS,(NEW ART SPACE)** Appellant, from a decision of the Regional Assessment Appeal Court, Halifax City Assessment Region, made on March 23rd, 1987, which decided the Appellant occupies certain premises at 5211 Blower Street, Halifax as a professional artist's studio and "does not qualify for exemption from business occupancy pursuant to Section 25 B (1) of the Assessment Act"

and

THE DIRECTOR OF ASSESSMENT,

and

THE CITY OF HALIFAX

RESPONDENTS.

BEFORE: RICHARD L. WELDON, Member

COUNSEL: STEPHEN G. COUGHLAN, LL.B. for the Appellant, Ilze Berzins (New Art Space)
WAYNE ANSTEY, Q.C. for the City of Halifax, a Respondent
RANDALL R. DUPLAK, LL.B., for the Director of Assessment, a Respondent;

DECISION

Pursuant to Section 16(1) of **CHAPTER 9, S.N.S. 1981, THE MUNICIPAL BOARD ACT,** THE CHAIRMAN assigned Board member Richard L. Weldon to hear this assessment appeal at the Board's October 8, 1987 sittings at the Board Room of the

Expropriations Compensation Board, 1660 Hollis Street Halifax, N.S. commencing at 10 A.M.

A bundle of documents entitled "Notice of Appeal" (Exhibit B-2 in this hearing) were filed with the Board on May 8, 1987. Those documents filed with the Board were all on the same letterhead. The outside document consisted of two pages of paper addressed in handwriting to the Board and was signed by Ilze Berzins (who gave viva voce evidence before the Board) and were (each page) date stamped May 8, 1987 by the Board. The next document in the bundle is also partly typed and partly handwritten (and fully photostated) and appears on its one page to be identical in its typewritten portions to the first page of the document addressed to the Board, is addressed in handwriting to the Director of Assessment, and appears to be date stamped by "Halifax City Assessment Region" April 10, 1987. The third document is much the same as the second except that it is addressed "Dear City Clerk" and appears to be date stamped April 10, 1987 by one E. Kerr "City Clerk City Hall".

The Notice of Appeal alludes to a decision of the Regional Assessment Appeal Court dated March 23, 1987 which purports to affect the Appellant's business occupancy of "1558 Barrington Street". The Appellant testified that the business occupancy assessment which she was appealing to the Board concerned her occupation of a room situate on the second floor of 5211 Blowers Street. The Board is aware that these are both streets in Halifax and that they intersect. All three counsel present made no comment over this apparent discrepancy and Ms. Berzins was quite clear in her testimony that she only had one appeal before the Regional Assessment Appeal Court concerning one assessment. The Board can therefore only conclude that the business occupancy assessment which the Regional Assessment Appeal Court related to " Property: 1558 Barrington Street " is the same business occupancy assessment which Ms. Berzins says relates to her occupation of a room situate on the second floor of 5211 Blowers Street and for the purposes of this decision, at least, the Board will so hold and will refer to the occupied premises as the " premises ".

The decision of the Regional Assessment Appeal Court appealed from is short, succint, and bears quoting here:

> " On hearing Ilze Berzins, on behalf of the Appellant, and hearing Barrie Woodworth on behalf of the Director of Assessment, I find that the Appellant uses the subject premises as a professional artist's studio, and accordingly does not qualify for exemption from business occupancy pursuant to Section 25 B (1) of the Assessment Act. Accordingly I must dismiss this appeal."
> [emphasis by the Board]

Before the hearing commenced it became apparent to all concerned that there were to be challenges to the Board's jursidiction to hear Ms. Berzins' complaints against the assessment of her operation conducted on the premises. As a consequence of this anticipated challenge to the Board's jurisdiction to hear the appeal on its merits, all parties submitted prehearing memoranda on the jurisdictional matters and the Board decided to determine those jurisdictional matters and then and only, if the Board found it had jurisdiction, to hear evidence concerning the merits of the appeal at a later hearing.

With this direction in mind, Mr. Coughlan called Ms. Berzins and adduced from her the procedural facts that he felt entitled her to come before the Board to have her assessment appeal heard upon its merits. She noted that she was carrying on a cultural activity on the premises and that she believed she was entitled to be relieved of any business occupancy assessment (and therefore business occupancy tax) related to her occupation of the premises. Ms. Berzins said she had never before been assessed for her operation and that none of her friends in like occupations of their respective premises had had their premises assessed for business occupancy. She felt she was dissatisfied with the decision of the Regional Assessment Appeal Court.

After Ms.Berzins received the decision of the Regional Assessment Appeal Court on March 31, 1987 (She and the Notice of Appeal referred to April 1, 1987), she consulted with civic officials who informed her that she might appeal the decision of the Regional Assessment Appeal Court to the Nova Scotia Municipal Board and that she would have to prepare a Notice of Appeal and serve it on the City Clerk and the Director of Assessment. On April 10, 1987 she did both. When her appeal did not come on for hearing she inquired of the same people why her appeal had not been heard and she was then referred to Ms. Doreen White, Clerk of the Nova Scotia Municipal Board, with whom she filed the " Notice of Appeal " (more fully described above) on May 8,1987.

Ms. Berzins made clear in her evidence that her only connection with the premises was as a tenant-occupier of the same and that she was not the owner-assessed or otherwise-of 5211 Blowers Street (a.k.a.1558 Barrington Street) and, since that property was owned the Board infers that it was owned, at all times material to this appeal, by some person other than Ms. Berzins.

In the circumstances Mr. Duplak, for the Director, and Mr. Anstey for the City of Halifax called no witnesses themselves, cross-examined Ms. Berzins lightly, or not at all. Mr. Duplak introduced into evidence as Exhibit B-5 an affidavit of Doreen White.

At the conclusion of the short evidentiary portion of the hearing, all counsel made oral argument and declined a Board invitation to file further memoranda. The Board, at the conclusion of argument, reserved its decision which it is herein delivering.

Mr. Coughlan, for the Appellant, argued that his client believed -and when given the opportunity- would adduce evidence to show that she was a person aggrieved by the decision of Regional Assessment Appeal Court concerning her assessment for business occupancy assessment of the premises. He contended that his client -who retained him sometime after she had served and filed "the Notice of Appeal" herein- had complied with all the procedural formalities to allow her before the Board to try her appeal on its merits. He submitted that her appeal was directed to the issue that the Board should strike her name off the assessment roll on the grounds that her occupancy of the premises was for one of the uses which section 25 B (1) of the Assessment Act, R.S.N.S.1967, as amended, said should not give rise to any business occupancy assessment.

Mr. Duplak, for the Director, objected to the jurisdiction of the Board on two distinct grounds.

No.1 He alleged that the Appellant had not complied with the procedural requirements of Section 100(1) of the Assessment Act in that the "Notice of Appeal" was not filed with the Nova Scotia Municipal Board within 30 days of the delivery of the decision of the Regional Assessment Appeal Court to Ms. Berzins. He submitted that any such failure destroyed the jurisdiction of the Board to proceed with the appeal other than to dismiss the appeal for such lack of jurisdiction.

During argument, as an ancillary to this point, was raised the additional question of whether the owner of 5211 Blowers Street (a.k.a.1558 Barrington Street) should also have been served with a copy of the "Notice of Appeal". If such were a requirement under Section 100(1) of the Assessment Act the admitted failure to make any such service would be likewise fatal to the jurisdiction of the Board to hear the Appellant's appeal on its merits.

No.2. He argued that the remedy sought by the Appellant was not to be categorized as a striking from the roll of her name (which is within the jurisdiction of the Board according to sections 77(1),99 and 101(2) of the Assessment Act) but should be categorized as a request for exemption from assessment which he views as a " question relating to [the] assessment " to be dealt with by the Supreme or county court under section 108(1) of the Assessment Act. Mr. Duplak took the position that such a question was within the sole jurisdiction of such Supreme or county court and that the Board was excluded from having any jurisdiction in such a question relating to the assessment of the premises.

According to Mr. Duplak, if the Board accepts either or both of these arguments it would have no juridiction to proceed to hear this appeal on its merits.

Mr. Anstey, on behalf of the City, strenuously made much the same arguments. He admitted that the result of this particular appeal would have little effect one way or another upon the tax revenues of the City. He most clearly pointed out that the City had a strong public policy interest in bringing a fair finite end to a ratepayer's right to appeal his assessment. He noted that the Board, if it accepted the Appellant's position that she could file her Notice of Appeal with the Board almost anytime, would be establishing a dangerous precedent with which taxpayers could put the safe base of a municipality's taxation into a state of uncertainty for a considerable period of time. Mr. Anstey argued that the Board must put the Appellant to the strict proof of the facts necesary to raise the Board's jurisdiction to hear this appeal on its merits. If the Appellant could not meet that burden the Board must dismiss the appeal now for lack of jurisdiction

Mr Coughlan replied to these arguments as follows:

No.1. Section 100(1) of the Assessment Act provided for service of the Notice of Appeal on certain individuals within 30 days, that all these individuals had been served, and that the Notice of Appeal had to be filed with the Nova Scotia Municipal Board before the appeal could be set down for hearing. He says these things were all done and that the Board should get on with the hearing of the appeal on its merits.

He argued that there is no property involved in this appeal and therefore the requirement of Section 100(1) of the Assessment Act that service be made within 30 days on "the person in whose name the property is assessed, if he is not that person" has no application in the present appeal. As an alternative he argues that the "property involved" is the the business occupancy assessment of the Appellant and, as she does not fall within the phrase ", if he[she] is not that person" no notice to the owner of the property is required.

No.2. He categorized the relief sought as that of striking the name of the Appellant off the rolls which, he reiterated, was a function of the Regional assessment Appeal Court under section 77 (1) and, if it erred, as they did in this case (according to Mr. Coughlan), an appeal from it to the Board was appropriate. He argued that the issue was in the present appeal not a matter of " exemptions" as argued by the other counsel.

Counsel reviewed considerable Board decisions on these topics as well as number of court authorities.

The above summaries of the arguments of counsel contain the Board's understanding of the nubs of the conflicting arguments in this appeal.

The Board will now extract Sections of the Municipal Board Act and the Assessment Act with which it will concern itself in the resolution of these jurisdictional issues. Extracts from the Municipal Board Act are set out more fully in Schedule A to this decision. In Schedule B hereto the Board has set out the appropriate extracts from the Assessment Act.

To have her appeal heard on its merits, the first hurdle the Appellant must successfully jump is the requirement for service contained in Section 100(1) of the Assessment Act. Within 30 days of delivery of the Regional Assessment Appeal Court decision to her, she must serve a copy of the notice of appeal upon:

1. The City Clerk of Halifax (the clerk of the Municipality in which the property is situate), and
2. The Director, and
3. The person in whose name the property is assessed if she was not that person

Beyond dispute, the Director was served a notice of appeal herein in a timely manner. See S.190 of the Assessment Act. This is only right since the Director has an overseeing function over the whole of the municipal assessment field in the province and his knowledge of, and frequent participation in, assessment appeals clearly serves the public interest and is preserved by the legislation requiring him to be served with notice of assessment appeals made to the Board.

Regardless of the meaning put upon the word "property" as it modifies "clerk of the municipality in which it is situate" it is clearly the Clerk of the City of Halifax that must be served (and who was served in time) in this appeal. The business occupancy assessment which is the subject of this appeal concerns an occupancy of a location within the boundaries of the City. If, in the context of this section of the Assessment Act, "business occupancy assessment" can constitute "property" then the City Clerk of the City must be served. If the word "property" in the same context means the " property in which the occupancy is located"(i.e. the land and building assessed to the Appellant's landlord) then the City Clerk must still be served. Again the statutory requirement for service of the City Clerk makes sense in a public policy context since the City has a direct interest in the amount and taxability of assessment located within its bounds.

"The person in whose name the property is assessed, if he is not that person, " in this section creates a real problem to the Appellant here if the " property " is the land and buildings assessed to the Appellant's landlord. The Appellant is not the assessed owner of the premises in which her subject occupancy exists. Whoever that landlord may be she did not serve him within 30 days as is required by said Section 100 (1).

If, on the other hand, " property " in the context of this section means the " business occupancy assessment being appealed " then the Appellant was not required to serve herself since she is " that person " and is thus excluded from the service requirements.

The Board notes in passing that there appears no overriding public policy concerns which would require service of a notice of appeal of assessment on the Appellant's landlord in circumstances such as exist here.

The results of this appeal, one way or another, would have minimal effect on the burden of municipal taxation which might fall on the Appellant's landlord otherwise than as determined in this appeal. He probably couldn't distinguish any difference in his municipal tax burden when the issues of this appeal were finally decided. There would be a difference but it probably would be difficult to detect and to identify because of its low magnitude in the total picture of the City's tax gathering scheme as it affects the Appellant's landlord. Public policy basis for the legislation, or no, if the correct interpretation of the word " property " in this section is such as to include the Appellant's landlord as a person who must be served with a notice of appeal, then the Appellant must fail in her appeal on the grounds that the Board has no jurisdiction to hear the appeal because the Appellant has not served all the persons listed by the legislature in S. 100 (1) of the Assessment Act.

For greater ease in analysis, the Board assigns to the "property " interpretation conducive to the hearing of Appellant's appeal on its merits the title of "Property B". It assigns to the interpretation of "property" in S.100 (1) so as to deprive this Board of its jurisdiction the title of "Property A".

For analysis of the use of a word in a particular section of a statute it is of some value to go to the use of the same word (and similar concepts) in the same statute with particular reference to the definition section of the statute. In respect to the Assessment Act this practice may have some particular value having regard to the fact that some rather simple English words are used and statutorily defined as having meanings far afield of their usual, or even proper, English meaning. "Property " itself in the context of the statute appears to be one such word to have a tortured meaning much at odds with its conventional English meaning.

"Property A" interpretation seems to be supported by, at least, the following sections of the Assessment Act:
1 (a) (i); 1 (a) (v); 1 (ca); 1(ja); 1(m) [all definition sub-sections]; 2; 3 (1) (a); 7(1); 7(2); 7(6); 10(1); 10(7); 17(2); 38(1); 69(1); 77(4); 85(2); 89(1)(a).

"Property B" interpretation seems to be supported by sections 25(1); 25(3); 89(1)(f) of the Assessment Act. Although section 25(1) is included in Schedule B to this decision it bears repeating here:

> "25(1) All assessments shall be designated as being residential property, commercial property or resource property, or partly the one and partly the other."

Certain other sections of the Assessment Act deal with the concepts of "property" and "occupancy assessments" and status for appeals but appear to the Board to be neutral in any effect they may have in helping the Board to fathom the true legislative intent contained in S.100(1) of the Assessment Act. These are listed as follows:

S.1(n); 3(1)(wb); 6(2); 6A(1); 15; 23; 25A(1); 25B(1); 28; 77(1); 85(1); 89(1)(d); 89(1)(e); 91(1)(a); 91(1)(b); 92A(2); 100(2); 100(3); 102; 207(1).

Under Section 25(1) of the Assessment Act it is clear that all assessments, which must include business occupancy assessments, shall be "designated" as one type or another (or mixed) of " property " and under s.s.(3) of the the same section all assessments (including business occupancy assessments) are to be placed on the roll. That, in fact, is what happened in this case. The occupancy of the Appellant was designated as " business occupancy " and was placed on the roll its sum presumably having been calculated as a percentage of the valuation of the land and buildings which it apparently, in part, occupied.

The question now to be determined is better phrased or expressed by being posed thusly: Does the designation pursuant to S.25(1) of the Assessment Act of the business occupancy assessment herein as commercial property make that business occupancy assessment "property" within the meaning of S.100(1)?

If it does, the Appellant would not have to serve her landlord with a notice of appeal in order to perfect her appeal herein. His lack of knowledge of the appeal would have no appreciable harm to him so there is no acute public policy reason why he should be so served.

The definition sections of the Assessment Act clearly define property as being something other than occupancy assessment. Much of the rest of the statute recognizes the difference between property and occupancy assessments and indicates that they are not the same thing. The difference that appears to the Board (with the artificial exception of Crown property) between property and occupancy assessments is that a property must exist before a sum for occupancy assessment can be calculated as a percentage of occupancy of that property and then sub-identified to determine what percentage rate of assessment should be charged to that particular occupancy. An occupancy assessment cannot exist without an underlying property to which it can be attached.

The sections of the Assessment Act dealing with definition of property clearly do not include occupancy assessments within their definition of property. The numerous other sections of the Assessment Act supportive of the dichotomy between " property " and "occupancy assessments " (listed above as Property A) make a clear distinction between the two words/concepts.

Section 25(1) of the Assessment Act, which appears to be contrary to this view, is capable of another construction which is compatible with these apparently conflicting sections of the Assessment Act. Section 25(1) of the

Assessment Act deals with the designation of occupancy assessments, inter alia, naming them as specific types of property so that they be more easily understood and identified when they are added to the roll under the provisions of s.s.(3) of the same section. If there were no such provision as Section 25 of the Assessment Act, there would be no clear mandate under S.23 of the Assessment Act (as there is, for example, under S23 (a), (b), and (c) of the Assessment Act) to include occupancy assessments on the roll even though a valid occupancy assessment could be placed on an occupying ratepayer. Thus, under this interpretation of Section 25(1) of the Assessment Act, the definition of occupancy assessments is not changed so that they become property within the meaning of Section 100(1) of the Assessment Act. This interpretation would make the reading of Section 25(1) of the Assessment Act consistent with the clear meaning of the many other sections of the Assessment Act cited and, after consideration of all those sections, the Board believes this interpretation reflects the true intent of the Legislature and thus the Board adopts it and concludes that it was necessary for the Appellant to serve her landlord in order fully to comply with the service provisions of Section 100(1) of the Assessment Act.

Since its inception the Board has invariably held that the failure to serve any of the persons listed in Section 100(1) of the Assessment Act, regardless of the injury to the appellant, was fatal to the jurisdiction of the Board. The Board will refer to some of those cases to demonstrate the consistency of the Board in both upholding the law on jurisdiction which it believes applies to the Board and in reporting for anyone to see who reads the Board's decisions the apparent injustices that often affect aggrieved ratepayers who, sometimes on their own, attempt to appeal their assessments to the Board.

YEAR	CITATION	COUNSEL	BOARD
1983	Landry v. Director 2 M.B.D. 71 [1]	no	D.W.W.
1983	Shier v. Director 2 M.B.D. 1[2]	no	E.L.(S)
1983	Oakland v. Director 2 M.B D. 43[3]	no	E.L.(S)
1983	Goomar v. Director 2 M.B D. 61[4]	no	R.H.B.
1983	McGill v. Director 2 M.B D.163[6]	no	D.W.W.
1983	Pioneer v. Director 2 M.B D. 81[7]	no	D.W.W.
1983	Scattolon v. Director 2 M.B D. 93[8]	no	D.W.W.
1983	Misty Moon v. Director 2 M.B D. 99[9]	yes	E.L.(S)
1983	MacKinnon v. Director 2 M.B D.149[10]	no	D.W.W.
1983	Hollis v. Director 2 M.B D.311[11]	no	D.W.W.
1984	Diab v. Director 3(A) M.B D.13[12]	no	E.L.(S)

1984	Knickle v. Director	3(A) M.B D.215[13]	no	E.L.(S)
1985	Director v. Chipman	4(A) M.B D.343[14]	yes	R.H.B.
1986	Country v. Director	5(A) M.B D.1[15]	yes	R.L.W.

The incidence of appeals under the Assessment Act which are rejected because of the service provisions of S. 100(1) appears from these citations to be reducing but the Board does not know whether that incidence reflects fewer assessment appeals being brought by taxpayers representing themselves or whether the public users of the Board's facilities have become more sophisticated in their use of those facilities. Over the years covered by the above cited decisions, there has been relatively little legislative action simplifing the process of service of notices of appeal in assessment matters.

At the Regional Assessment Appeal Court level of appeal pursuant to S.77(1) of the Assessment Act the aspiring appellant need only file his notice in writing with the Recorder of the Regional Assessment Appeal Court and give the Recorder an address for service. S.84 (1) and S.86(1) of the Assessment Act instruct the Recorder to make such further services on such further persons as the Legislature has deemed are to be necessarily notified concerning assessment appeals. The basic taxpayer appeal requires merely the service of a notice in writing on one person.

The Board has no business in questioning whether the Legislature is right in requiring service of notices of appeal to the Board on at least three times more people than was required at the Regional Assessment Appeal Court level. The Board does have the duty of discerning the intent of the Legislature when it interprets the Assessment Act and that intent is clearly to make it much more difficult for an unrepresented taxpayer appellant to appeal to the Board than it is for the same taxpayer to make his initial appeal to the Regional Assessment Appeal Court. That intent has persisted in the face of the citations of the disqualifying decisions listed above. There are conflicting public policy goals in an assessment appeal. One public policy goal is to make easy and fair access to aggrieved ratepayers to the assessment process, including the assessment appeal process. A conflicting public policy goal is to allow all interested public governing bodies full knowledge of appeals which may affect the assessment base for municipal taxation. To the Board the process on notification used at the Regional Assessment Appeal Court level seems to address fully both of these public policy requirements.

The Board deals with planning appeals which also often have an importance to others than those that might be directly involved in the the matter at hand. The Planning Act has precise time limits for serving notices of appeal of those matters which are appealable to the Board but it only requires service of those notices of appeal on the Board. The Board, usually through its Clerk, keeps all parties which the Legislature deems should be notified apprised of the appeal in progress with timely notices and notifications. It assists the taxpayer, when requested to do so, in his duties of serving hearing notices. Failure of jurisdiction in planning matters to be appealed before the Board on account of the failure to serve a notice of appeal on time can only be in respect of one notice to be served on one person. In practice, the service as done under the Planning Act seems to meet the dual goal of simplicity to the appellant-taxpayer and prompt alertness of the appeal to all interested bodies who may or may not wish to engage in the appeal process. The Board has no knowledge of the adequacy of the service practice before the Regional Assessment Appeal Courts so that it can make no comment on the adequacy of the service process used there. But it does note that no reason in logic that the service process used there should not be equally effective as the service process used before the Board in planning matters has proven itself to be.

The Board commented at much length on these matters of service in this appeal since it notes the manifest injustice in this appeal of an appellant with grave legal issues of import to be canvassed cannot have those issues canvassed in the appeal forum she has chosen merely because she has not served her landlord who, the Board is quite certain, would be very unlikely to have any real interest in the Appellant's appeal or the results that might flow from the final outcome thereof. After noting the injustice, the Board notes the length of time the difficult service process has been on the statute books despite the litany of decisions set out above dealing with similar problems of failure of service.

The Board was urged to find that the Appellant was out of time as well in not having filed her Notice of Appeal with the Board within the same 30 day period. As a matter of fact her notice of appeal was not filed with the Board within 30 days of the date of the delivery of the decision of the Regional Assessment Appeal Court to her. The Board has previously adverted to this alleged defect in previous decisions.

In Country Harbour Hardwoods[15] the Board (Weldon) danced around the issue of the timing of the filing of the notice of appeal with the Board as may be seen from the following quotations lifted from the decision:

> p16 "... It is clear that the letter of May, 13 1985, would have been filed in time with the Board ... [which might give a casual reader that there was a specific time limit for the filing of a notice of appeal in assessment matters with the Board]...and the two dates are less than 30 days apart. The letter of May 28 may not have been so timely, since it may have been out of time completely, depending on the date of the receipt by the Appellant of the decisions appealed from. In any event, there is a 'window of appeal' as to time which finally closed May 13, 1985, at the latest and may have been

triggered [the closing of the window?] by the date, April 21, 1985, at the earliest. ..."

[By page 18 of the decision the Board began to see that there may be a distinction between " service " and "filing " within section 100(1)Assessment Act where it says:
"...thus the Notice(s) of Appeal was filed with the Nova Scotia Municipal Board.]

"Begging the question of timeliness, it is clear that the appellant accomplished the filing of the Notice of Appeal with the Nova Scotia Municipal Board....
[p23] 6. In view of the dismissal of the appeal on other grounds, the Board declines to find whether the Notice of Appeal was one or both of the letters cited and declines further to make a finding of whether or not the Notices, either or both of them, were adequate and timely."

Country Harbour Hardwoods$_{15}$ was decided early in 1986.

Dr. Goomar$_4$ decided in 1983 by the Board (Blois) contained the following phrase:

"Also it was clear that the Board received a copy of the Notice of Appeal...within the appeal period... the Appellants had 30 days...in which to appeal."

From this clause one might infer that service of the initiating notice of appeal on the Board within 30 days is a jurisdictional prerequisitefor an assessment appeal. A careful reading of the the whole Dr. Goomar$_4$ decision shows that the Board did not actually decide the point and, given the other numerous defects in service, had no need to decide the point. Dr. Goomar$_4$ is, at worst, neutral on the question whether service of the initiating notice of appeal on the Board within 30 days was a jurisdictional prerequisite for an assessment appeal.

Landry $_1$, a 1983 Board (Wilson) decision, had this to say concerning the question whether service of the initiating notice of appeal on the Board within 30 days was a jurisdictional prerequisite for an assessment appeal:

> p77 ..."Secondly, Section 100(1) does not fix a period within which the Notice of Appeal is to be filed with the Municipal Board unless the section is to be interpreted to mean the Notice of Appeal is to be filed with the Municipal Board within 30 days..."

Landry 's[1] decision seems to indicate, without deciding, that filing of the initiating notice of appeal on the Board within 30 days is not a jurisdictional prerequisite for an assessment appeal.

Hollis[11] decision of the Board (Wilson) also dealt with the issue of service of the initiating notice of appeal on the Board within 30 days of the delivery of the decision of the Regional Assessment Appeal Court on the appellant. The Board found *non-service* on one of the required persons and then went on to say:

> p318" Having so decided, it is not necessary for the Board to determine whether the failure by the Appellant to file a copy of the Notice of Appeal with the Board within the thirty day period is fatal to his right of appeal."

Apparently the Board has not been forced before to decide the question whether service of the initiating notice of appeal on the Board within 30 days of the delivery of the decision of the Regional Assessment Appeal Court on the appellant was a jurisdictional prerequisite for an assessment appeal. It is not forced to do so in this case since it has at least one other ground which prevents the

Board from taking jurisdiction to hear this appeal on its merits. It therefore adopts the words of Hollis[11] as its own:" Having so decided, it is not necessary for the Board to determine whether the failure by the Appellant to file a copy of the Notice of Appeal with the Board within the thirty day period is fatal to his [her] right of appeal."

Counsel for the Appellant cited A.W. Peters Enterprises Limited v. City of Dartmouth [1984] 3 (A) M.B.D.91[5], a full Board decision, where the Board heard the issue concerning whether or not the Appellant therein was entitled to have determined what was and what was not assessable property. Counsel for the Appellant cited Lebanese Association of Nova Scotia v. the Director [1984] 3 (A) M.B.D. 19[16] (full Board) for the proposition that the Board could deal with the issue of whether or not a particular occupancy should be assessed for business occupancy. At p31 of that decision the Board had this to say:

> " ... the appellant occupies property as a tenant...for the purposes of a non-profit cultural organization within...Section 25B(1) of the Assessment Act...and therefore ' shall not be assessed for a business occupancy assessment ' or in other words is exempt from business occupancy assessment.[emphasis that of the present Board] "

The present Appellant feels she could, given the chance, qualify, as did the Lebanese Association, and "not be assessed for a business occupancy assessment."

Re Halifax Civic Workers Union [1983] 2 M.B.D. 319[17], cited by counsel for the Appellant, found the full Board again taking jurisdiction dealing with a claim by an Appellant not to be assessed.

> "[p344] The Board is of the opinion that it has jurisdiction to make a determination pursuant to Section 25B (1)...by virtue of the decision of Mr. Justice Nathanson...in the matter of ... Halifax Civic Workers Union...[1982 S.H. No. 38745]... Because the applicants had not brought themselves within the ambit of Section 108... Justice Nathanson decided that the court had no jurisdiction to consider or determine the application. He went on to state that 'It would appear that the proper course is to file an appeal under s. 77...."

Mr. Coughlan, of course, also cited Nathanson J.'s decision Halifax Civic Workers Union Local 108 and Halifax Civic Workers Social and Benifit Club v. Director of Assessment 54 N.S.R.(2nd) 390[18]

Mr. Anstey, for the City, cited in support of his arguments that the subject matter of the appeal was a claim for an exemption which was a matter of assessment which fell only within the jurisdiction of the Supreme or county court in accord with S. 108 of the Assessment Act the following cases:

Public Service Commission of Halifax v. Halifax County and Nova Scotia 65 N.S.R.(2nd) 69[19]

Lunenburg,Municipality of the District of v.Public Service Commission of Bridgewater and Director of Assessment 59 N.S.R.(2d) 23[20]

The thrust of these cases was that exemption from taxation was solely a matter for the Supreme or county courts under S.108(1) of the *Assessment Act* and not a matter subject to appeal to the Regional Assessment Appeal Court under S.77(1) of the *Assessment Act*.

Mr. Duplak, for the Director, also cited *Acadia University v. Town of Wolfville* 2 N.S.R.(2d) 630[21], *Nova Scotia Barristers Society v. Director of Assessment and Halifax, City of* 46 N.S.R.(2d) 403[22], *Edgehill School v. Town of Windsor and Director of Assessment* 32 N.S.R. (2d) 263[23].

After reading the cited cases and reading and listening to the argument of all learned counsel for all the parties, the Board concluded that this seemingly simple appeal, concerning a modest business occupancy assessment, raised assessment issues of considerable complexity and interest. It might have been of some interest to the participating governmental bodies to have those issues resolved before the Board and, if necessary, resolved definitively on appeal from the Board.

It may be unfortunate that these issues cannot now be resolved because the Appellant did not serve her landlord with a Notice of Appeal.

For all the reasons stated above the Board dismisses the appeal on the grounds that it lacks jurisdiction to hear the same. In the circumstances there will be no costs.

An order will issue accordingly

DATED AT HALIFAX, NOVA SCOTIA, THIS 19th DAY OF NOVEMBER, A.D., 1987.

RICHARD L. WELDON
MEMBER
NOVA SCOTIA MUNICIPAL BOARD

SCHEDULE A

EXTRACTS FROM MUNICIPAL BOARD ACT

"4.The Board shall
(a) perform such duties as are conferred on it by this Act,...the Assessment Act...

...

9 (1)...Clerk...have the custody and care of all...documents...pertaining to the Board...

...

16 (1) The Chairman shall from time to time assign the members of the Board to its various sittings and may change any such assignment at any time.

...

22 (1)... the costs of and incidental to any proceeding before the board shall be in the discretion of the Board, and may be fixed at a sum certain, or may be taxed.

...

27 (2) Parties shall be notified of the commencement of the proceedings and of any hearing and may appear and participate in the hearing.

...

29 In any matter before it, the Board shall grant an order, either as specified in the application or notice of appeal or as the Board decides, and may by order dismiss the application or appeal.

...

32 (1) The Board has exclusive jurisdiction in all cases in respect of all matters in which jurisdiction is conferred on it.

(2) The Board as to all matters within its jurisdiction under this Act has authority to hear and determine all questions of law or of fact.1981, c9, s.32.

33 (2) The Board has jurisdiction to hear and determine a question of fact notwithstanding that a proceeding involving the same question of fact is pending in a court. 1981, c.9,s. 33.

34 the finding or determination of the Board upon any question of fact within its jurisdiction is binding and conclusive.1981, c.9, s.34.

35(1) An appeal shall lie to the Appeal division...upon any question as to its jurisdiction or upon any question of law...with leave...

...

37(1) The Board may...upon the application of any party...state a case in writing for the opinion of the

Appeal Division...upon any question which in the opinion of the Board is a question of law.

...

42(1) A decision of the Board shall be in writing and shall set forth reasons for the decision.

SCHEDULE B

EXCERPTS FROM THE ASSESSMENT ACT

"1. In this Act,

(a) "assessable property " means:

(i) land ...;

...

(v) buildings and structures...

...

(ca) "commercial property" means all property or part thereof except residential or resource property,...

...

(ja) "occupant" includes the resident occupier of the land...a leaseholder and a person having or enjoying in any way for any purpose the use of land otherwise than as owner...

(k) "person" includes firm, company, association and corporation;

(m) "property" means assessable property;

(n) "ratepayer" means a person liable for taxation under this Act;

...

(o) "respondent" means a person in respect of whom or in respect of whose property an appeal has been asserted under subsection (2) or (3) of section 77;

...

2 Subject to the exemptions in Section 3, all assessable property and business and residential occupancy assessments are liable to taxation for all purposes...

3 (1) The following property is exempt from taxation under this Act:

(a) all property vested in Her Majesty...unoccupied or occupied by some person in an official capacity: if any such property is occupied by any person otherwise than in an official capacity, the occupant shall be assessed and rated in respect thereof, but the property itself shall not be liable;

...

(wb) property of a non-profit community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization, if exempted by council by by-law and to the extent and under the conditions set out in the by-law, and, in the opinion of the council, the organization provides a service that might otherwise be a responsibility of the council;

...

6(2) Where property ceases to be exempt from taxation the Director shall give written notice to the person liable for taxation of the assessment of the property and of any occupancy assessment.

...

(4) An assessment pursuant to this section may be appealed in accordance with Sections 77 and 78.

6A (1) If any property becomes exempt from taxation on or after the first day of January...the owner or occupant of the property before it became exempt... is entitled to an abatement of tax in respect of that property...

...

7 (1) In addition to any assessment of property under this Act, every person occupying or using any commercial property...shall be assessed for a sum to be called " business occupancy assessment".

...

7 (2) Business occupancy assessment shall be computed by reference to the assesed value of the property occupied...

...

7(6) Every person assessed for a business occupancy assessment is liable for the payment of the tax thereon, and the tax levied does not constitute a lien upon the real property.

...

10(1) Every person...

(a) commences any business...in connection with which he has not been assessed a business occupancy...shall give notice to the Director...

...

10(7) An assessment pursuant to this Section may be appealed in accordance with Sections 77 and 78.

...

15 The director shall ascertain by diligent inquiry and examination the names of all persons liable to be rated..., their property..., and the extent amount and nature of the same, and for such purpose shall examine each property from time to time in such detail as he shall consider necessary.

...

17(2) The Director may...request...information required by him...to make a proper assessment of the property or occupancy assessment of the person to whom the request is delivered.

...

23 The director with the assistance of the assessors having ascertained ... the particulars of the property to be assessed shall prepare the assessment roll in which shall be set down

(a) the location and a concise description of each separate piece of assessable property, with the name and the owner thereof;

(b) the assessed value and classification of each lot or piece of assessable property in such detail as the assessor may determine;

(c) the amount of exemption for each property;...

(e) such other particulars as the assessor deems necessary or as the Minister directs.

25(1) All assessments shall be designated as being residential property, commercial property or resource property, or partly the one and partly the other.

...

(3) Assessments shall be arranged on the roll in such order as the Director may determine.

25 A (1) A council may by by-law determine that...all or any part of the property that is subject to taxation of any nonpropfit [non-profit] community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization or institution named in the by-law that is classified as commercial property shall be taxed at a percentage of its assessed value, not exceeding one hundred per centum and not less than the percentage of the assessed value of residential property to which the tax rate applies, as the council may set out in the by-law.

...

25 B (1) Persons occupying property for the purposes of any non-profit community, charitable, fraternal educational, recreational, religious, cultural or sporting organization or institution shall not be assessed for a business occupancy assessment.

...

28 Except as in this Act otherwise provided, property shall be assessed as property of the owner

...

34 Property partly exempt from taxation or in respect to which assessment is fixed by law at an amount of the assessment determined by the assessor shall be valued and entered on the assessment roll in the same manner as taxable property is valued and entered; and the amount of exemption or reduction applicable to the property shall also be shown.

35 Assessable property wholly exempt from taxation shall be valued and entered on the assessment roll in the same manner as taxable property is valued and entered.

38 (1) All property shall be assessed at its market value,...

...

64 (1) On or before the thirty-first day of December in each year, the director shall complete the roll...

...

69 (1) In any year the Director after the assessment roll has been filed...discovers that property or occupancy assessment...which is liable to taxation has been omitted from the assessment roll, the Director shall... assess the person for the property or occupancy assessment...

...

(3) An assessment pursuant to this section may be appealed in accordance with sections 77 and 78.

...

77 (1) Any person complaining that he has been wrongfully inserted in or omitted from the assessment roll or that his property has been undervalued or overvalued by the assessor or that his property has been wrongfully classified may give notice ... that he appeals from the insertion, omission, valuation or classification...

(4) Where a person complains that a property has been undervalued, or has been wrongly classified, and where that property is occupied by a person who is assessed an occupancy assessment, then the person complaining shall give notice... to the occupier...

...

79 The court for the hearing and determination of appeals shall be the regional assessment appeal court.

...

85 (1) Where the Director alters an assessment pursuant to section 84, the director shall recompute and, if different from before, correspondingly alter any business occupancy assessment computed by reference to that assessment

(2) Where the director alters a business occupancy assessment pursuant to this Section, the Director shall immediately serve an ammended notice of assessment upon the business occupant.

(3) a notice from the Director pursuant to this Section may be appealed in accordance with Sections 77 and 78.

...

88 (1) The court, after hearing the appellant and any witnesses he produces, and the respondent and any witnesses he produces, and the assessors, if necessary, shall determine the matter.

...

89 (1) On any appeal, the court may

(a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed;

(aa) dismiss the appeal;

(b) add to the roll the name and assessment of any person left off the roll;

(c) strike off the roll the name of any person wrongfully entered thereon;

(d) transfer the assessment to the proper person when any property has been assessed in the name of a person who is not legally liable to be assessed therfor;

(e) when any property has been assessed more than once, strike out the assessment that is improper or illegal;

(f) change the classification of all or part of the property that is subject to the appeal; and

(g) correct any clerical errors made by the assessor in the assessment roll.

...

91 (1) The court may, of its own motion,

(a) add to the roll any property that has been omitted therefrom with the value thereof as determined by it and the name of the person to whom it should be assessed; and

(b) increase the valuation of any property.

...

92A (1) Where the court reduces or increases the valuation of a property pursuant to Section 89 or 91 and does not confirm reduce or increase a business occupancy assessment computed by reference to that valuation, the Director shall recompute and ... correspondingly alter that business occupancy assessment.

(2)... the Director shall immediately serve an amended notice of assessment upon the business occupant.

(3) A notice from the director pursuant to this section may be appealed in accordance with Sections 77 and 78.

93 All increases or reductions in assessment, transfers of assessment and other changes, corrections, alterations, confirmations of assessments, dismissals of appeal or additions made by the court or the Director... shall form part of the official roll.

...

99 Any person aggrieved by a decision of the assessment appeal court... may appeal therefrom to the Nova Scotia Municipal Board.

100 (1) Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within 30 days from the day when notice of the decision was received, on the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise.

(2)The...town or municipality may appeal by serving notice of appeal, within 30 days from the day when notice of the decision was received, on the person in whose name the property is assessed, the person who appealed the assessment if he is not that person and the Director, and by filing a copy of the notice of appeal with the clerk...

(3) The Director may appeal by serving notice of appeal, within thirty days from the day notice of the decision was received, on the person in whose name the property is assessed, the person who appealed the assessment if he is not that person and the clerk of the municipality or town in which the property is situate, and by filing a copy of the notice of appeal with the clerk....

(4) A notice of appeal shall state with particularity the grounds of the appeal.

101 (1) The ...Board shall inquire into the matter de novo, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter.

(2) On the appeal the Board shall have all the powers of the regional assessment appeal court.

102 Any sum rated upon any person may be collected or recovered notwithstanding an appeal.

...

108 (1) The town or municipality, the Director or any person assessed may apply on originating summons [notice] to Supreme Court or to the county court for the determination of any question relating to assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongly classified.

(2) A copy of the originating summons [notice] shall be served upon the Director, the clerk and the persons assessed in respect of the property.

(3) No...notice...shall be issued except within the time for commencing an action or other proceedings set forth in Section 109.

...

(6) The judgment given on any... notice...under this Section is binding upon and shall be given effect by the assessment appeal court or any court on appeal therefrom.

109 No action....shall be brought in any court with respect to an assessment or to rates based on assessment,

(a) except within six months after... the forwarding of the roll...;

(b) where an appeal has been taken to the assessment appeal court, except within six months from the time limited for appealing therefrom to the ... Board; and

(c) where an appeal has been taken to the ...Board, except within thirty days after the date of the decision of the... Board;
but, where an appeal has been taken to the Appeal Division ..., no action or proceeding shall be brought in any other court with respect to the assessment...
...
190 Any notice required by this Act to be served on the Director shall be sufficently served if served on a regional director of assessment or delivered to an assessment office maintained by the Director.

...
207 (1) Except as provided herein, and notwithstanding any general or special Act, no town or municipality shall grant an exemption from property taxes, fixed taxes or assessment or tax concession unless authorized by the Governor in Council.

SCHEDULE C

DECISIONS OF THE BOARD AND CASES CITED IN ATTACHED DECISION

1. Landry v. Director 2 M.B.D. 71
2. Shier v. Director 2 M.B.D. 1
3. Oakland v. Director 2 M.B D. 43
4. Goomar v. Director 2 M.B D. 61
5. Peters v. Dartmouth 3 (A) M.B.D.91
6. McGill v. Director 2 M.B D.163
7. Pioneer v. Director 2 M.B D. 81
8. Scattolon v. Director 2 M.B D. 93
9. Misty Moon v. Director 2 M.B D. 99
10. MacKinnon v. Director 2 M.B D.149
11. Hollis v. Director 2 M.B D.311
12. Diab v. Director 3(A) M.B D.13
13. Knickle v. Director 3(A) M.B D.215
14. Director v. Chipman 4(A) M.B D.343
15. Country v. Director 5(A) M.B D.1
16. Lebanese v. Director 3 (A) M.B.D. 19
17. Halifax Civic Workers Union 2 M.B.D. 319
18. Halifax Civic Workers v. Director 54 N.S.R.(2nd) 390
19. Public Service Comm. v. Hfx County 65 N.S.R.(2nd) 69
20. Lunenburg v.Pub. Serv. Comm. & Dir.59 N.S.R.(2d) 23
21. Acadia v. Town of Wolfville 2 N.S.R.(2d) 630
22. Bar Society v. Director 46 N.S.R.(2d) 403
23. Edgehill v.Windsor and Director 32 N.S.R. (2d) 263.

Burgess v. Director of Assessment

ASSESSMENT--COMMERCIAL AND BUSINESS OCCUPANCY--NINE-HOLE PAR 3 GOLF COURSE--MARKET VALUE--WHETHER COST APPROACH OR INCOME APPROACH--ASSESSMENT ACT, S.38

This is an appeal by R.B. from five decisions of the Halifax City Regional Assessment Appeal Court dealing with the 1985 assessment of five adjacent properties to the rear of Herring Cove Road and Bronson Ave. in Spryfield, across which extends the Briarwood Golf Course, a nine-hole Par 3 golf course. The five parcels cover 148.5 acres, of which 34 acres constitute the golf course. Each parcel has 3 zones: R-2 (closest to Herring Cove Rd.), then R-1 and to the rear Holding Zone. Two of the parcels extended beyond the City boundaries into the County of Halifax and are unzoned. The 1985 total assessed value for the properties was $362,100; the regional court determined the value to be $341,300. The Assessor arrived at a market value of $359,000 using the cost approach. The Appellant's appraiser calculated value at $208,750 using the income approach. Both rejected the direct sales comparison approach because there had been no sales of Par 3 golf courses in the province to use as comparables.

HELD: The Board allows the appeal and determines the 1985 market value of the five properties to be $176,900. The business occupancy assessment is $67,900. Costs are awarded to the Appellant to be taxed on a party and party basis in the County Court scale.

The Board agrees with the income approach advocated by the Appellant for a golf course such as Briarwood that is operated as a business. The private owners depend on user fees as the major source of revenue. The golf course is a business that should be valued in its present commercial use. In examining the income approach, the Director of Assessment objected to certain expense items in the Appellant's normalized financial statements. The Board agrees that an expense item for mowing, even if the Appellant did much of the mowing himself, is a reasonable inclusion for a golf course. The expense included as proprietor's wage is the cost of management of the business and this a prospective purchaser would consider in deciding whether the business was financially viable. The Board also accepts the Appellant's capitalization rate of 18.3782 as reasonable taking into account the degree of risk to an investor represented by a Par 3 golf course operated seasonally and heavily dependent on weather. As to the Holding Zone lands, the Board agrees that values calculated from comparable sales of bulk lands should be reduced because these lands to the rear are restricted in access to road frontage by the layout and operation of the golf course. The Board also adjusts the estimate of value to reflect the 1983 level of assessment of 77%. This total is apportioned among the five properties according to acreage. The business occupancy assessments are accordingly adjusted.

NSMB:123-85-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, Chapter 14;

- and -

IN THE MATTER OF: An Appeal by REX BURGESS from five decisions of the Regional Assessment Appeal Court, Halifax City Region, dated September 30, 1985 on the assessed value of property at the rear of 647-655 Herring Cove Road, rear of Bronson Avenue, rear of 3 Bronson Avenue, rear of 675 Herring Cove Road and rear of 677 Herring Cove Road.

BEFORE: ELIZABETH SALTON, Member

COUNSEL: MICHAEL T. PUGSLEY, LL.B., for the Appellant;

RANDALL L. DUPLAK, LL.B., for the Director of Assessment

DECISION

A hearing was held September 29 and 30, 1986 in the Expropriations Compensation Board Room, 1660 Hollis Street, Suite 904, Halifax on an appeal by Rex Burgess from five decisions of the Regional Assessment Appeal Court, Halifax City Region, dated September 30, 1985, on the 1985 assessed value of properties at the rear of 647-655 Herring Cove Road, rear of Bronson Avenue, rear of 3 Bronson Avenue, rear of 675 Herring Cove Road and rear of 677 Herring Cove Road.

In a report filed as Exhibit B-8 the mapping technician for Halifax City Assessment Region refers to each of the properties by number, a simple identifying system which the Board adopts in this decision. Accordingly, the property at the rear of 647-655 Herring Cove Road is Parcel 1, the property at the rear of Bronson Avenue is Parcel 2, the property at the rear of 3 Bronson Avenue is Parcel 3, the property at the rear of 675 Herring Cove Road is Parcel 4, and the property at the rear of 677 Herring Cove Road is Parcel 5. Briarwood Golf Course, a nine-hole Par 3 golf course, extends across all 5 parcels. To the rear of the golf course are extensive undeveloped lands.

Five separate undated Notices of Appeal were received by the Board on November 27, 1985. Each Notice of Appeal contains 6 grounds of appeal which are generally similar but vary somewhat in detail. Briarwood Golf Course, a nine-hole Par 3 golf course, extends across all 5 parcels. To the rear of the golf course are extensive undeveloped lands.

> The first ground in each appeal alleges incorrect total acreage of the property and indicates "actual acreage".
>
> The second ground alleges incorrect acreage ascribed to the golf course on the property (Briarwood Golf Course) and indicates "actual acreage".
>
> The third ground alleges inconsistent assessment with neighbouring properties "when one factors in the value of sewer, water, and road frontages on these neighbouring properties".
>
> The fourth ground alleges incorrect "in use" taxation of land, indicating that the 5 parcels of land, except for the golf course area on each, are being used exclusively for forestry purposes and so should be classified as resource property.
>
> The fifth ground states that the assessor has incorrectly used the cost approach method to value the golf course rather than the income approach method which is "a much more valid approach to valuing commercial properties".
>
> The sixth ground alleges incorrect procedure to determine the value of the land not occupied by the golf course because the assessor had not seen the land which is rugged and rocky and contains bogs and swamp, and so "could not possibly form a

valid opinion of value".

At the commencement of the hearing, Counsel for the Appellant withdrew the fourth ground of appeal in which the Appellant claimed that his properties, other than the area used for the golf course, were forest property which should be classified as Resource.

The Board having satisfied itself that all necessary preliminary matters had been carried out assumed jurisdiction to hear the appeal on the merits.

The 5 parcels of land under appeal lie adjacent to each other on the west side of the Herring Cove Road in Spryfield near the southern extremity of the Mainland South Area of the City. Parcels 1 and 2 extend across the boundary between the City of Halifax and the Municipality of the County of Halifax. In total, the five parcels cover 148.5 acres. Parcel 1 is the most northerly and has frontage of the width of one residential lot on Herring Cove Road. As well it abuts the rear boundary of eight existing residential lots on Herring Cove Road. Parcel 2 has frontage on Bronson Avenue, a short street which runs south from Herring Cove Road, and abuts the rear boundary of one residential lot on Herring Cove Road. Parcel 2 has the same depth as Parcel 1 but is somewhat L-shaped and so abuts the rear boundaries of Parcels 3, 4 and 5. None of these smaller parcels 3, 4 and 5 has frontage on a public road and each abuts the rear boundaries of lots fronting on Herring Cove Road.

Each of the 5 parcels is subject to three City land use zones: R-2 (closest to Herring Cove Road), then R-1, and to the rear of the parcels, Holding Zone. The portions of Parcels 1 and 2 in the Municipality are unzoned. The Par 3 golf course located on the subject property is located on the R-2 and R-1 portions of all 5 parcels of land. The golf course covers 34 acres in total of which 19.3 acres are used for fairways.

Evidence for the Appellant was given by Mr. Burgess and Eric Piccott, an accredited appraiser. The assessor, the mapping technician and three other person gave evidence for the Director.

In his post-hearing brief, Counsel for the Director identified three issues in this appeal:

> "1. Which is the proper approach to use: The cost approach or the income approach?
>
> 2. How should the land under the golf course and the improvements to the golf course be valued?
>
> 3. What value should be allowed for the holding zone lands?"

In his post-hearing submission Counsel for the Appellant enumerated the "main contentions" in this appeal as follows:

> (i) The Assessor did not have proper regard to the in-use of the lands on which the Golf Course is situate;
>
> (ii) The Assessor used an incorrect approach in valuing the Golf Course Lands;
>
> (iii) With regard to the Holding Zone Lands, the assessor improperly valued these lands given existing comparables."

With reference to the grounds of appeal alleging incorrect acreage for each parcel and for the amount of land in each parcel used for the golf course, the evidence of Nancy Saunders, a mapping technician, was not disputed by the Appellant although her calculations resulted in different totals from those cited by the Appellant in his Notices of Appeal. The Board accepts the calculations set out in her report (Exhibit B-8) of the total acreage of the 5 parcels under appeal (including the allocation of acreage in the City and in the Municipality), the acreage used for the golf course and the breakdown of acreage according to zoning classification.

Evidence from the Appellant indicated that the 5 parcels of land under appeal had been acquired piecemeal between 1956 and 1971. Since acquisition, 15 residential lots - 14 with frontage on Herring Cove Road - were subdivided and sold. Bronson Avenue was deeded to the Province by the Appellant in 1959 when the area was still part of the Municipality prior to its annexation by the City in 1969. The Appellant had proposed to create a residential subdivision on the 5 parcels. Exhibit B-15 is a plan of the proposed subdivision dated March 7, 1972 showing 145 lots. The subdivision did not receive approval from the City so the Appellant developed the Briarwood Golf Course instead.

Mr. Burgess estimated that the construction of the course, which took 2 years, cost approximately $150,000.00 including a value for his own labour. It opened in the summer of

1982 as a 9-hole, Par 3 course, 1399 yards in length, open dawn to dark from May until approximately November each year. According to Mr. Burgess, the golf course is operated as a partnership by he and his wife. Most of the revenue from the operation comes from green fees although there are members who have varied in number from 42 to 53 since the course opened. Membership in Briarwood Golf Course is in effect a "season ticket" involving no ownership or control in the operation.

Conflicting estimates of value were presented by Rodney Caiger the assessor and Eric Piccott, an accredited appraiser retained by the Appellant. The assessor calculated the market value of the portion of the subject properties within the City to be $359,000.00. Mr. Piccott calculated the market value to be $208,750.00. The 1985 total assessed value of the properties as appealed to the Regional Assessment Appeal Court was $362,100.00. The total value determined by the regional court was $341,300.00

Mr. Caiger used the cost approach to arrive at a market value of the subject properties for assessment purposes. Mr. Piccott relied on the income approach to value.

The assessor chose the cost approach by a process of elimination. He rejected the income approach to value because it relies heavily on an appropriate capitalization rate. He considered that the capitalization rate was a key component in the income approach and since golf courses are typically non-profit and not frequently marketed he believed that there was insufficient data available for the calculation of an appropriate capitalization rate. He rejected the Direct Sales Comparison (or market) approach because he could find no evidence of sales of Par 3 golf courses in the province. In using the cost approach however he determined "the majority of value" in the subject properties by using the Direct Sales Comparison approach to establish the site value. According to Mr. Caiger all golf courses in the province are valued for assessment purposes by the cost approach.

Mr. Piccott rejected the Direct Sales Comparison (market) approach for the same reason as the assessor - that there had been no sales of Par 3 golf courses to use as comparables. He chose the Income approach in preference to the cost approach because the current use of the subject properties is revenue producing and he believed that a purchaser would be interested in the potential revenue rather than original cost. As an alternative method, he valued the subject properties by the cost approach determining the value of the golf course improvements and calculating the land value as a residual value after the application of the Income approach valuation. He arrived at an identical value by this approach.

Both Mr. Caiger and Mr. Piccott used cost data for golf courses from the Marshall Valuation Service Costing Manual.

Counsel for both the Appellant and the Director argued the issue of the proper approach to be used in the valuation of the Appellant's lands. Counsel for the Director contended that uniformity of assessment as required by Section 38 of the

Assessment Act would be affected if the subject properties were valued by the income approach while all other golf courses in the province were valued by their cost approach. Even if the income approach is appropriate he questions some calculations by Mr. Piccott involving the normalized expenses, proprietor's wages and capitalization rate.

Counsel for the Appellant argued that the assessor had improperly eliminated the Income approach without consideration of the nature of the business of the Par 3 golf course on the subject properties, that he had improperly applied a combined Cost and Market approach to valuing the lands used for the golf course by valuing them for speculative or highest and best use rather than for the existing golf course use, and that he had not considered the valuation of other comparable 9-hole golf courses in order to achieve uniformity.

Evidence was introduced on the 1985 assessed value of three other 9-hole golf courses in the metropolitan area. The Airline Golf Course in Goffs, close to the Halifax International Airport, is a full size 9-hole course of 2500 yards on 29 acres of land, assessed at $134,900.00. The Sackville Golf Course is a lighted 9-hole Par 3 course of 2400 yards with a driving range on 25 acres of land, assessed at $124,100.00. The Pin-Hi Golf Course is a Par 3 course of 1600 yards on 13 acres of leased land on the Hammonds Plains Road, assessed at $49,500.00.

It appears from the copies of assessment records for two of these 9-hole golf courses that the land value attributed to the Pin-Hi course was $3,000.00 per acre and for the Airline course $3,600.00 per acre. This compares reasonably with the assessor's value of $3,500.00 per acre for all the residentially zoned lands in the subject property (which is slightly more than the area covered by the golf course itself). The considerable difference in total value between each of the three 9-hole golf courses cited above and the Briarwood Golf Course seems to arise from the method of calculating site improvements. Mr. Caiger had used the Marshall Valuation Manual to acquire an adjusted value-per-hole figure which he added to the land value. In each of the three other golf courses various values appear to have been calculated for specific improvements such as buildings, lighting, fencing, and equipment. Whether Mr. Caiger's method of combining land value and adjusted Marshall Valuation Service values for golf courses is preferable to the method used in the other three 9-hole golf courses is not a matter for the Board to decide. The Board notes however that the cost approach used in these golf courses appears to have been applied differently.

The Board agrees with the approach to value advocated by Mr. Piccott for a Par 3 golf course such as Briarwood. Such an approach may not be appropriate for a conventional full-size golf course which is owned and controlled by its members and is not intended to be a profit making operation (e.g., Ashburn or Brightwood golf courses in the Metro area). The users of a Par 3 golf course however, normally pay fees which entitle use but not ownership or control of the facilities provided. Such fees provide the major source of revenue to the owner or operator. As such, it is a business which should be valued in its present commercial use.

The Board rejects the argument that the cost approach should be used to value Briarwood Golf Course because this is the method used for all other golf courses in the province. The cost approach was formerly used to value shopping centres in the province: now the income approach is used by the Province's assessors. The Board is not advocating a wholesale changeover in approach for all golf courses but it does conclude that for a profitable commercial operation such as Briarwood Golf Course, the income approach is appropriate.

Counsel for the Director argued that Mr. Piccott's calculations were "substantially in error" in three matters: the normalized expenses for the golf course, the proprietor's wages and his choice of capitalization rate.

The Briarwood Golf Course normalized statement for 1986 prepared by Mr. Piccott (Page 21 of Exhibit B-6) reads as follows:

"NORMALIZED

REVENUE		
Total Receipts		$90,000
EXPENSES		
Advertising	$ 500	
Golf Course Supplies	$ 5,000	
Resale supplies	$ 1,700	

Employee Wages	$ 6,500		
Mowing	$ 5,000		
Hospital Tax	$ 1,000		
Proprietor Wages	$19,000		
Total	$38,700		$ 38,700
Net Income			$ 51,300
Deferred for 3-1/2 years (mid point of 1986 to 1 January, 1983)			x .6322
Present Value 1 January, 1983			$ 32,430
Capitalized @		14%	
Property Tax Rate @		4.3782	
Total Capitalization Rate		18.3782	x 5.4412
Value by the Income Approach			$176,459
Rounded to			$176,500"

Mr. Piccott had available to him financial information for the original partial year 1982 up to an including the end of August 1986. His 1986 figures were for gross receipts only.

Mr. Duplak objected to the inclusion of mowing expenses ($5,000.00) in the normalized statement because the Appellant's evidence was that he did much of the mowing himself. Whether the owner of the golf course chooses to do this work himself or hires others to do it, mowing is an operation essential to the maintenance of a golf course. It is an expense which would be taken into account by a prospective purchaser who might choose not to reduce this expense by doing the work himself as the

Appellant does. The Board agrees that an expense item for mowing as though it were contracted out is not an unreasonable inclusion in the normalized statement. Whether or not the $5,000.00 amount is realistic, the Board has no alternate figure in evidence to consider and therefore accepts this figure.

Mr. Duplak objected as well to the $19,000.00 expense item for proprietor's wages, arguing that the net income amount of $51,300.00 should be increased by the amount categorized as proprietor's wages. In the opinion of the Board, a prospective purchaser would consider the cost of management in deciding whether the business was financially viable for his purposes, and the expense of "proprietor's wages" is the cost of management of the business. The amount of this expense chosen by Mr. Piccott ($19,000.00) may be somewhat excessive since the golf course is open on average for 6 months of the year, however, start-up and close-down time may extend the length of time needed for effective management of the operation.

Thirdly, Mr. Duplak objected to the capitalization rate chosen by Mr. Piccott. Mr. Piccott considered that Briarwood Golf Course was a business involving considerably more risk than industrial/commercial properties in Burnside Industrial Park in Dartmouth which have capitalization rates, based on sales data, of 11-12%. Mr. Piccott justified the suitability of his capitalization rate of 14% because it is higher than the rate for better constructed, better located, industrial rental properties in Burnside and lower than the usual rates for taverns which are considered a higher risk and so have a higher capitalization rate. To his chosen rate of 14%, Mr. Piccott added the 1983 tax rate of $4.7382 because the property is to be valued for assessment purposes as of January 1, 1983. The Board accepts Mr. Piccott's capitalization rate of 18.3782 as a figure which reasonably takes into account the degree of risk to an investor represented by a Par 3 golf course operated seasonally and heavily dependent on weather.

Mr. Duplak acknowledged that the Income Approach used by Mr. Piccott did not require a separate value for the land on which the golf course is located. The Board prefers the Income approach to the Cost approach used by the assessor.

All Parcels 1 to 5 are partially covered by the City's Holding Zone to the rear of the portion of the properties used for the golf course. The assessor and the Appellant's appraiser considered the same comparable sales of bulk land zoned Holding and arrived at an adjusted value per acre of $1,400.00 and $1,500.00 respectively. Mr. Piccott however, discounted this value per acre by 50% because the Holding Zone lands have no road frontage and can be accessed only by a rough track across the centre of the golf course. Each of the comparables has some frontage on a public road. In the opinion of the Board the the rear lands are currently accessible by the Appellant but their direct access to road frontage is restricted by the layout and operation of the golf course. The Board believes the value per acre of the Holding Zone Lands should be adjusted accordingly.

Mr. Piccott's reduction of 50% which results in a value per acre of $750.00 appears to be somewhat excessive: the Board prefers a value of $1,000.00 per acre for the rear lands zoned Holding. Mr. Piccott had estimated that the rear lands comprised 43 acres. The Board accepts Ms. Saunders' calculation of 47.4 acres. The value of the rear lands zoned Holding then becomes $47,400.00 (47.4 x $1,000.00).

To this must be added a value for the lands zoned R-1 to the rear of the golf course which are not part of the golf course area. Ms. Saunders calculated that 87.2 acres of the total of 148.5 acres in Parcels 1-5 are in the City of Halifax. The golf course area is 34 acres in total and the Holding Zone area is 47.4 acres which leaves an additional 5.8 acres (87.2 - 34 + 47.4) to be valued at the value per acre for rear lands (5.8 x $1,000.00 = $5,800.00). The Board finds that the value of the lands of the Appellant in the City of Halifax not used as golf course area is $53,200.00 ($47,400.00 + $5,800.00).

The evidence of Mr. Piccott indicated that he did not apply the 1983 level of assessment to his estimate of value of the Briarwood Golf Course. Counsel for the Director stated in evidence that the 1983 level of assessment was 77% The Board accordingly applies the level of assessment to the value of the golf course ($176,500.00) and the value of the rear lands ($53,200.00) as follows:

$176,500.00 + $53,200.00 x .77 = $176,869.00

The Board determines that the total 1985 market value for assessment purposes of the subject properties in the City of Halifax is $176,869.00 or $176,900.00 (rounded). The total business occupancy assessment for the subject properties is $67,953.00 ($176,500.00 x .77 x .50) or $67,900.00 (rounded). These totals are apportioned among the 5 subject properties according to Ms. Saunders' calculations of the acreage of each land use zone in each of the parcels and according to her calculations of the acreage used for the golf course in each parcel, as follows:

Parcel No.	Commercial (Golf Course)	Levelled (x.77)	Total Commercial (rounded)	Business Occupancy (x.50)
1	$83,059	$63,956	$63,900	$31,950
2	$23,360	$17,987	$18,000	$ 9,000
3	$25,956	$19,986	$20,000	$10,000
4	$22,322	$17,188	$17,200	$ 8,600
5	$21,803	$16,788	$16,800	$ 8,400
	$176,500	$135,905	$135,900	$67,950

Remaining R-1	Holding Zone	Total Residential Lands	Levelled (x.77)	Total Residential (rounded)
$2,800	$16,000	$18,800	$14,476	$14,500
$ 800	$26,400	$27,200	$20,944	$20,900
$ 800	$ 1,800	$ 2,600	$ 2,002	$ 2,000
$ 700	$ 1,600	$ 2,300	$ 1,771	$ 1,800
$ 700	$ 1,600	$ 2,300	$ 1,771	$ 1,800
$5,800	$47,400	$53,200	$40,964	$41,000

The Board hereby allows the appeal and awards costs to the Appellant to be taxed on a party and party basis on the County Court scale. The Board appoints Arthur E. Hare, Q.C. to tax the costs awarded to the Appellant.

An Order will issue accordingly.

DATED at HALIFAX, N.S., this 1st day of December, A.D., 1987.

E A Salton

ELIZABETH SALTON
Member1

Cooling v. Director of Assessment

ASSESSMENT--JURISDICTION--FAILURE TO SERVE DIRECTOR OF ASSESSMENT OR REGIONAL DIRECTOR OF ASSESSMENT WITH NOTICE OF APPEAL--ASSESSMENT ACT, S. 100(1)

This is a hearing on the sole issue of jurisdiction in connection with an appeal from a decision of the Cumberland Regional Assessment Appeal Court that dismissed the appeal and confirmed the assessment. The Appellant failed to serve a copy of the Notice of Appeal on either the Provincial Director of Assessment or the Regional Director of Assessment.

HELD: The appeal is dismissed, without costs.

Because of the strict requirements of s.100(1) of the Assessment Act the Board regretfully has no choice but to dismiss this appeal. The Appellant's failure to serve the Notice of Appeal on the persons required results in the Board being unable to assume jurisdiction to hear the appeal on the merits. Although this may appear harsh, counsel for the Director had notified the Appellant as to who should be served. The Board does agree with the Appellant about the Regional Court's decision, and encourages members of these Courts to be more informative.

NSMB-150-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by **CHARLOTTE G. COOLING** from a decision of the Regional Assessment Appeal Court for the Cumberland Assessment Region dated June 17, 1987, which decision confirmed the Appellant's assessment at $14,400.00 for a building and lot located in East Wallace, Cumberland County, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: CHARLOTTE G. COOLING, appearing on her own behalf, without counsel;

RANDALL R. DUPLAK, LL.B., on behalf of the Director of Assessment.

DECISION

The hearing of this appeal on the sole issue of jurisdiction took place in the Council Chambers of the Municipality of the County of Colchester, Church Street, Truro, Nova Scotia, on Thursday, November 12, 1987.

The decision of the Regional Assessment Appeal Court Cumberland Region dated June 17, 1987, and signed by R.C. Tait, refused the appeal as follows:

"Ex parte - Appeal dismissed - Assessment Confirmed"

The Appellant filed a Notice of Appeal on the Board dated July 6, 1987, which was received by the Board on July

9, 1987. In that Notice the Appellant indicated that she did not understand the reason for the dismissal and that no explanation had been offered.

Counsel for the Director of Assessment gave notice to the Appellant by letter dated July 13, 1987, that Section 100(1) of the Assessment Act required that a Notice of Appeal be served on the Clerk of the Municipality of the County of Cumberland and on the Provincial Director of Assessment or the Regional Director of Assessment.

Evidence from the Appellant, Charlotte Cooling, indicated that she had received this letter and that she thought she had complied with the requirements of the Act. She also testified that she did not appear at the Regional Assessment Appeal Court in person because she was informed that if she provided the necessary information it was not necessary for her to attend.

Counsel for the Director of Assessment submitted to the Board an Affidavit from Robert Warren, the Provincial Director of Assessment, and Ronald Borne, Regional Director for the Cumberland Assessment Region, indicating that the Notice of Appeal had not been served on them. Attached to the Affidavits were letters from Charlotte Cooling addressed to "Clerk, Cumb. Asses. Region," and to "Regional Assessment Appeal Court, Cumberland Assessment Region". Counsel contended that the latter did not constitute service of the Notice of Appeal upon the Provincial Director of Assessment or the Regional Director of Assessment.

Because of the strict requirements of Section 100(1) of the Assessment Act the Board regretfully has no choice but to agree that the Appellant failed to serve a copy of the Notice of Appeal on either the Provincial Director of Assessment or the Regional Director of Assessment. Although this may appear unduly harsh on the Appellant, the Board notes that in Mr. Duplak's letter of July 13, 1987, in paragraph 4, specific reference was made to the persons upon whom a Notice of Appeal must be served and these were repeated again in the following paragraph of his letter. Although specific names and addresses for the positions were not provided, the Board believes that the onus is on the Appellant to obtain the proper addresses for all Notices of Appeal.

The Board agrees with the Appellant that the decision of the Regional Assessment Appeal Court is not very informative and somewhat difficult to understand. The use of the term "Ex parte" in decisions is an example in point. The Board has noted this situation in other matters which have come before it and would encourage members of Regional Assessment Appeal Courts to be more informative in their decisions. The Board also notes that this is not the first time it has been told that an Appellant has been informed by Municipal Offices that it was not necessary to personally attend a Regional Assessment Appeal Court hearing.

The Board is satisfied from the sworn Affidavit and the evidence presented that the statutory obligation of the Appellant to serve the Notice of Appeal upon the Director or Regional Director of Assessment was not complied with. This failure of the Appellant to comply with the requirements of

Section 100(1) of the Assessment Act results in the Board being unable to assume jurisdiction to hear the appeal on the merits.

The Board therefore, for the reasons stated, confirms its decision stated at the hearing and dismisses this appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 16th day of November, A.D., 1987.

MICHAEL G. JOHNSON, C.A.,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Director of Assessment v. Gallant

ASSESSMENT--RESIDENTIAL--JURISDICTION--POWER TO ADD A PROPERTY STRUCK FROM ROLLS BY REGIONAL ASSESSMENT APPEAL COURT--MARKET VALUE--THREE-UNIT APARTMENT BUILDING GUTTED BY FIRE--COST APPROACH AND MARKET APPROACH--GENERAL LEVEL OF ASSESSMENT--ASSESSMENT ACT, SS. 38(1),(2),(3), 64(1), 65(1), 66(3), 89(1), 91(1), 99, 101(1),(2)--MUNICIPAL BOARD ACT, S. 16(1)

This is an appeal by the Director of Assessment from a decision of the Cumberland Regional Assessment Appeal Court that deleted from the rolls entirely the 1987 assessment of the subject property. The property is a corner lot at Croft and Beacon Streets in Amherst and is presently occupied by the shell of a building that has been partially reconstructed after a fire gutted it on Dec. 11, 1986. The building was originally a three-unit apartment building. There are no occupants. The Respondent objected that the Board did not have the power to add to the rolls a property that had been originally on the rolls and then had been struck from the rolls by the Regional Assessment Appeal Court.

HELD: The appeal is allowed and the subject property valued at $26,900. The Board will make no order as to costs.

The Assessor who gave evidence had never seen the property for the purpose of assessing it prior to the fire and had little personal knowledge of the property at the relevant time, Dec. 1, 1986. Where there is a conflict between the Assessor and the Respondent as to the state of the building on Dec. 1, 1986, I resolve it in favour of the Respondent. By s.101(2) of the Assessment Act, the Board on assessment matters has the powers of the Regional Assessment Appeal Court and no other powers. Those powers are set out in s.85. It is abundantly clear that a valuation must be put on this property regardless of whether the Board has jurisdiction to put the assessment and the name of the owner back on the roll. There are absolutely no grounds that the Board can see on the evidence to strike the name and assessment of the Respondent off the roll. The Board is required to hear this appeal de novo as provided for in s.101. The roll is before us, as is the name of the assessed owner, and this Board is to decide whether to confirm, reduce or increase the valuation. The Board does not have to consider whether the Regional Assessment Appeal Court properly struck the name and assessment off the roll because, insofar as the Board is concerned, they are on the assessment roll before the Board. The Assessor valued the property by the cost approach and the market approach, but made no allowance for the lack of heating on the second floor. The Board was impressed by the market valuation approach and agrees it is the appropriate one in this appeal. The comparables were in close proximity and were all appropriately compared and adjusted. The cost of heating units on the second floor should be deducted from the market value arrived at by this method. The resulting value should be reduced to 93% to agree with general level of assessment.

NSMB-146-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, Chapter 14;

- and -

IN THE MATTER OF: **THE DIRECTOR OF ASSESSMENT,** Appellant;

- and -

IN THE MATTER OF: **RAYMOND E. GALLANT,** Respondent.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: RANDALL R. DUPLAK, LL.B., on behalf of the Director of Assessment;

RAYMOND E. GALLANT, acting on his own behalf.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, Municipal Board Act, the Vice-Chairman assigned Board Member, Richard L. Weldon to hear this assessment appeal at the Board's September 1, 1987, sittings at the Council Chambers of the Town of Amherst, Ratchford Street, Amherst, Nova Scotia (the Town of Amherst will be hereinafter referred to as the "Town").

This is an appeal by the **DIRECTOR OF ASSESSMENT** from the decision of the Regional Assessment Appeal Court, Cumberland

Region, dated April 27, 1987, whereby that Court deleted from the rolls entirely the 1987 assessment of the property owned by the Respondent, **RAYMOND E. GALLANT**, situated at the corner of Croft and Beacon Street, and being civic number 36 Beacon Street, Amherst, Nova Scotia. The assessment under appeal to the Regional Assessment Appeal Court was a residential assessment of $34,600.00 and it was listed on the assessment roll under the name of the Respondent, Raymond E. Gallant.

The Notice of Appeal dated May 22, 1987, was filed on May 22, 1987, and is marked as Exhibit D-1. The following are the grounds of appeal as set out in the Notice of Appeal:

> "1. THAT the Regional Assessment Appeal Court failed to value the state of the property as of December 1, 1986;
>
> 2. THAT the Regional Assessment Appeal Court erred in striking the property from the assessment roll;
>
> 3. SUCH other grounds that may appear from the evidence."

The Appeal was heard on September 1, 1987, at the Town Council Chambers on Ratchford Street pursuant to the Notice of Hearing. Counsel for the Appellant filed an estimate of valuation prepared by an assessor on or before the day of the hearing and the Respondent filed a submission in argument which is Exhibit D-7 which was alluded to by the Respondent when he was giving evidence. The hearing commenced at 10:30 a.m. and ended (after a lunch break) at 4:30 p.m. of the same day, September 1, 1987.

The subject property is a corner lot in Amherst with frontage on Beacon Street of approximately 74 feet. Its Croft

Street boundary is 112'; its backline 153' and its sideline is 100'. It is presently occupied by the shell of a building which according to the evidence has been partially reconstructed since a fire which gutted the building on December 11, 1986. The land is described as follows:

> "ALL that certain lot, piece or parcel of land situate at Amherst in the County of Cumberland and Province of Nova Scotia, which was conveyed to Morley T. McLaughlin by Borden I. Hunter by deed dated the 6th of August, 1948 and recorded at the Office of the Registrar of Deeds for the County of Cumberland in Book 199 at Page 667, and which was subsequently devised to Agnes M. McLaughlin by Will recorded at the aforesaid Office in Book 214 at Page 543 and which said lot is described in said deed as follows:
>
> BEGINNING at the corner formed by the Northeasterly margin of Croft Street with the Northwesterly margin of Beacon Street seventy four (74) feet to land belonging to E.J. Stonehouse;
>
> THENCE Northwesterly and at right angles to Beacon Street One Hundred (100) feet;
>
> THENCE Southwesterly and parallel with said Beacon Street Thirty (30) feet or until it comes to said Croft Street;
>
> THENCE along said Croft Street One Hundred and twelve (112) feet to the place of beginning;
>
> BEING the same as was conveyed from Donald W. MacLaughlin et al to Jean Hanright by deed dated the 4th day of July, A.D., 1962 and recorded in the said Registry of Deeds Office in Book 229, Page 422."

There are no occupants in the building which was originally a three-unit apartment building prior to the fire.

The Appellant proved appropriate service of the Notice of Appeal and Notice of Hearing and with the consent of all parties the Board assumed jurisdiction to hear the appeal on its merits. The Board is satisfied that the Appellant has properly carried out all the procedural requirements under the Assessment Act, R.S.N.S. 1967, Chapter 14.

The Respondent raised a preliminary objection that the Board had only the powers of the Regional Assessment Appeal Court and that those powers didn't include adding to the assessment rolls a property that had been struck off the assessment rolls by the Regional Assessment Appeal Court. The Respondent contended that the Municipal Board had only the power to add to the rolls a property that had been "omitted" from the rolls (presumably by the assessor) and that the statute didn't deal with the case where a property had been originally on the rolls and struck from the rolls by the Regional Assessment Appeal Court as is the case here.

After making this preliminary objection, it was clear that if the Respondent were correct in this argument the Board would have no jurisdiction to hear the appeal. The Board reserved on this point and continued to hear the appeal with the understanding that if this objection were valid the Board would give effect to it.

In addition, the Respondent objected that the building on the property was essentially of no value in that it encroached on Croft Street and therefore was of no marketable use to anybody. He also made the argument that the building burned down on December 11, 1986, and was essentially of no value being a gutted building and that it ought not to have been put on the roll at all for the next year. Another argument made by the Respondent was that the buildings in question if they were demolished from the site could not be reconstructed and the only multiple unit possible on the particular site to be reconstructed under the current building by-laws of the Town of Amherst would be of a size and configuration that would be difficult to build and essentially economically impossible to rent. This seemed to be the pith and substance of the objections of the Respondent to having his property on the roll. He submitted that the striking of the property from the roll was a humane gesture made by the Regional Assessment Appeal Court because of the tremendous fire damage that he had received. He felt that decision met the spirit of the Assessment Act and ought to be followed by this Board.

The Appellant took the position that the property in question consisted of land and buildings on the land and if the building concerned encroached onto Croft Street that building had been in position so long that it was now completely situate on the lands owned by the Appellant even though the building was partly situate outside of the lands described in the Appellant's Deed. The Director further contended that the property was struck off the rolls by the Regional Assessment Appeal Court (for no apparent reason) and that it had been assessed by the assessor. The property and building was in situ at the effective date set by the Director of Assessment, namely December 1, 1986. The fact that the building on the land had burned on December 11, 1986 was unfortunate but did not change the requirement that it should be on the roll in the appropriate amount. The Director's counsel pointed out that in no instance would the land and services burn. Even if the building had been a total loss there should have been some assessment. These arguments and counter-arguments seem to contain all the issues that have to be resolved by the Board.

The Director called one witness the assessor, Mr. Malcolm Tizzard. The Respondent gave evidence himself and both parties made argument.

The Board, as mentioned above, took a view of the site and the comparables.

There is relatively little dispute on the facts. It appears that the property in question was the land as described on which was situate a two-storey building. The building very clearly, if not encroaching on the street, is closely located to the streets on two of its four sides. Since it is a large building, in comparison to the lot, it fills a large portion of the street corner portion of the lot. Much of the vacant square footage is at the back of the lot in the narrower portion of the lot. It is conceded by both sides that the building in question immediately after the fire was gutted completely and at that time was in an unsightly condition and of no real use or value. The Town of Amherst had shown some interest after the building was burned in purchasing the property but the price offered was rejected by the Respondent as too low.

The Town of Amherst then informed the Respondent that he had unsightly premises on the subject property and under that information the Respondent spent some $12,000.00 fixing up the outside of the building, (although not the inside) and making it neat as it is today. The Appellant was granted the necessary permits to rebuild the building on the exact foundations on which it originally existed. It became clear in the Respondent's cross-examination of Mr. Tizzard, the assessor who gave evidence for the Appellant, that no one from the assessment office had ever seen the second floor of the property and the evidence subsequently showed that there had been no heating units installed on the second floor.

It is quite clear the assessor who gave evidence had never seen the property for the purposes of assessing it prior to the fire. The information he had for the Board was taken from the assessment cards. Those cards showed the last assessor to have visited the property in 1984. According to this assessor such attendance was in line with departmental practice. Of course the condition of the property subsequent to the fire was much different than it was before the fire. It is clear that the assessor had little personal knowledge of the property at the relevant time which was December 1, 1986. Where there is a conflict between the evidence of the assessor and the evidence of the Respondent, I resolve the conflict in favour of the Respondent as to the state of the building on December 1, 1986 since the Respondent had knowledge throughout of his own building which he had purchased some years before the fire.

Section 38(1) of the Assessment Act, reads as follows:

> "1. All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the director on the open market

> by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the Town or municipality so as to ensure that taxation falls in a uniform manner upon all resource property and in a uniform manner upon all residential and commercial property in the Town or municipality.
>
> 2. The Director may from time to time describe a past date as a base for the determination of market value of a property for purposes of subsection (1).
>
> 3. Notwithstanding subsection (1) and subsection (2) the assessment of the property shall reflect its state as of the date referred to in subsection (1)(a) of Section 64."

The assessor had tried to assess the property. We must assume that when the Notice of Appeal to the Regional Assessment Appeal Court was filed the Director of Assessment reviewed the Notice of Appeal and took no action. Whether or not he did, the matter came before the Regional Assessment Appeal Court which, by decision dated April 27, 1987, struck the property off the roll - for reasons which are not apparent from the face of the decision.

The Director appealed with notices to all appropriate persons thereafter. The Director has a right of appeal under Section 99 of the Assessment Act which reads as follows:

> "Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board."

Section 101 of the Assessment Act spells out the duties of the Municipal Board on appeal:

> "(1) The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter.

> (2) On the appeal the Board shall have all the powers of the regional assessment appeal court."

This Board therefore on assessment matters has the powers of the Regional Assessment Appeal Court and by this statute has no other powers. The powers of the Regional Assessment Appeal Court that affect this particular matter may be found in Section 89 of the Assessment Act which reads as follows:

> "(1) On any appeal, the court may
>
> a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase ...;
>
> b) add to the roll the name and assessment of any person left off the roll;
>
> c) strike off the roll the name of any person wrongfully entered thereon;
>
> d) transfer the assessment to the proper person when any property has been assessed in the name of a person who is not legally liable to be assessed therefore:..."

Section 91(1) of the Assessment Act reads:

> "1. The Court may, of its own motion,
>
> a) add to the roll any property that has been omitted therefrom with the value thereof as determined by it and the name of the person to whom it should be assessed; and
>
> b) increase the amount of the valuation of any property."

It is quite clear from the above sections that the Regional Assessment Appeal Court under Section 89(1)(c) of the Assessment Act had a power to strike the name of any person wrongfully entered upon the roll so thus the decision on the face of it was not without authority and, even if it were without authority, it may not be the position of the Municipal Board, but of some other tribunal, to correct a Regional Assessment Appeal Court's decision which was made in excess of its jurisdiction.

Mr. Gallant's preliminary objection is based on what he contends to be the fact that the only situation in which the Board may add to the roll is when some name and assessment has been omitted from the roll. He says the Board has no power to replace a name and assessment which has been struck off the roll. He says that Section 89(1)(b) of the Assessment Act would allow the Municipal Board to add a name and assessment originally omitted from the roll that have been left off the roll but not, as in the present case, allow the Board to restore the name and assessment to the roll when they were originally put on the roll by the assessor and struck off by the Regional Assessment Appeal Court. In Section 91(1)(a) of the Assessment Act the person has not been "omitted" from the roll but has been "struck from" the roll and he says those two phrases are different. In grammar and semantics, Mr. Gallant may be correct.

The Board notes that under Section 89(1)(a) of the Assessment Act it may confirm the valuation of the property that is subject to the appeal. It is quite clear which property is the subject of the appeal. It is also clear that the Regional Assessment Appeal Court, and therefore this Board, has the power to confirm, reduce or increase the valuation of the property that is the subject of the appeal. The question then remains as to whether or not the Board has power to put on the roll the assessment and the name of the owner of the property that has been struck off, rightly or wrongly, by the Regional Assessment Appeal Court.

To determine what we are dealing with it would be wise to look back on some of the provisions of the Assessment Act that deal with the completion of the roll. The first is 64(1):

> "On or before the 31st day of December in each year, the Director shall complete the roll and
>
> a) complete and sign the certificate in Form B in the Schedule and attach it to the roll; and
>
> b) forward the roll and certificate to the clerk.
>
> (1A) The assessment shown on the roll shall be the assessment that reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll."
>
> ...
>
> 65(1) The director shall, on completion of the assessment roll, give notice of the assessment by serving each person liable to be rated with a notice which may be in Form C in the Schedule or to the like effect bearing the name of the director of assessment or of a person acting for him, showing the amount at which the property of the person has been assessed and the classification of the property with the same detail as appears on the roll.
>
> ...
>
> 66(3) Any person having an interest in the property may appeal from the assessment."

It is thus abundantly clear that a valuation must be put on this property regardless and the Board will proceed to do so (as has been urged by Mr. Duplak) even though it may or may not have jurisdiction to put the assessment and the name of the owner back on the roll.

The Board has reviewed the evidence and reviewed the legislation and reviewed the different positions that the Board would be in in relation to appeals and assessment rolls at the current stage of the proceedings and compared its position with the position of the Regional Assessment Appeal Court at its comparable position in the same proceedings. It is obvious from the practice that some of the restrictions on the Regional Assessment Appeal Court do not apply to the Board and the Board alludes particularly to the matter of costs which are given in conformity with the practice of the Board yet are prohibited to the Regional Assessment Appeal Court. I also note it is clear that the Regional Assessment Appeal Court is dealing with the roll from the beginning - but so is the Board when it hears a matter de novo. The only real concern the Board usually has with the decision of the Regional Assessment Appeal Court is the time, existence and delivery of that decision which together with the service of the Notice of Appeal gives the Municipal Board jurisdiction to hear the appeal. This Board is hearing this appeal de novo on the facts as provided for in Section 101. The roll would be before us, the name of the assessed owner of the property would be before us on that roll and this Board would be deciding under Section 89(1)(a) of the Assessment Act whether to confirm, reduce or increase the valuation of the property.

There are absolutely no grounds that the Board can see on the evidence adduced before it to strike the name and assessment of the Respondent off the roll. The property was valued as of December 1, 1986, the date set by the Director as proved in evidence, and the Board regards that name and assessment of the subject property on the assessment roll as being correct based on the evidence before it. The Board does not have to consider whether the name and assessment of the person was struck off the roll by the Regional Assessment Appeal Court properly because, insofar as the Board is concerned, it was on the assessment roll before the Board. The Board concedes that if the Director had not appealed the Regional Assessment Appeal Court decision the property would have been "struck off" the roll. That is not the case before the Board. The Board is reviewing the matter de novo with the Assessment Roll before it and the name of the Respondent is there as the assessed owner of the subject property. The problem then is whether to confirm, reduce or increase the valuation of the property that is the subject of the appeal. The facts bearing upon this particular aspect of the case have been set out above and the Board will now proceed under Section 89(1)(a) of the Assessment Act and make its decision on valuation.

It is quite clear that the assessor who gave evidence reduced the original assessment that was put on the property from $34,600.00 to $30,400.00. There is no contradictory evidence of valuation but on his cross-examination it was clear that he had never visited the property in a time which would allow an onsite appraisal prior to its almost total destruction by fire. It was likewise made clear his opinion on valuation is based on analysis of the records and a view of the site subsequent to the fire and his departmental records prior to the fire. It is clear from the evidence of the Respondent that there was no heating unit on the second floor. The assessor, because of the small number of rental units in the building (being a maximum of three) available for rental at any given time, discounted the income approach in setting up his valuation. This appears to be a departmental policy which has given rise to dispute in other assessment appeals but need not to be resolved here. Mr. Tizzard then proceeded to value the property by a cost approach using the Nova Scotia Valuation Manual for total value of $32,508.00. He preferred the market approach to value. He basically took the costs in those manuals from a model, multiplied the costs for a time adjustment of 1.88 to bring it up to the valuation day of December 1, 1986 and then estimated a depreciation factor of 70%. With the amounts then derived from these calculations he then added the land value which he had correlated from market data of sales of vacant land to be $55.00 a running front foot, assuming 100 foot depth. This lot is not truly rectangular in shape and decreases from a 74-foot frontage down to a 30-foot backline and one side slightly exceeds 100 feet. Nevertheless, this is the method with which he proceeded. He made no allowance for the lack of heating on the second floor and no allowance for the apparent encroachment of the building over the street line. In fact, he was of the opinion on viewing the site that the building did not impinge on the street lines.

It is clear the assessor was wrong in not adjusting the value arrived at by using the market value approach since he made no allowance for the missing heating installation and the Board is then put to the problem of valuing the missing heating installation in arriving at its valuation.

The Respondent brought no evidence on which to calculate a reduction that would allow the Board to take this into account in making its decision. It is quite clear that on the cost approach it was a very simple matter of calculation to calculate the appropriate deduction for the missing heating units. This was done by using a value derived from the manual applying the 1.88 time modifier reducing that amount by an obsolescence factor of 70%. This method applies when valuing by the cost approach method.

The assessor testified that he arrived at the general level of assessment by taking what he called "good sales" during the previous year and analyzing them against the assessment and he concluded that the general level of assessment in Amherst for the last available year was 93%.

He also calculated the valuation of $30,400.00 by using the market approach. The Board was impressed by this market valuation approach and agrees that is the appropriate approach to arrive at the value for assessment purposes in this appeal. The comparables were in close proximity to the subject property and were all appropriately compared and adjusted to relate to the subject property so that the properties selected were made truly comparable both in time, condition and market value. There were not wide discrepancies in value between the comparables and the subject property. In any event, this market value arrived at should be reduced to 93% of the total to agree with the general level of assessment.

The main problem in the matter of valuation (on the type of evidence adduced before the Board) is what to allow for the lack of heating on the second floor. The best evidence that the Board has is the current cost of the heating unit's full cost value. It seems likely that a purchaser would want to install heating units on the second floor and he would want to do it at current prices or reduce the purchase price accordingly. If the full cost of the heating installation is subtracted to arrive at a market value in these particular circumstances the Board would be valuing a "new" installation in an old building. This way the purchaser would get a fully heated building without any deduction for the scale of depreciation inherent in an older building. His newly installed heating would be more modern then the depreciated value of a heating unit which was contemporaneous with the building. Counsel for the Director has urged that the Board adjust the cost of heating installation by 70% for obsolescence but I would suggest these small defects would be dealt with more severely by a prospective purchaser. In any event there ought to be a reduction. In the absence of any evidence at all there would be a nominal $1.00 reduction just to recognize the fact there ought to be a reduction. In the presence of the evidence that the Board has (which is worked off a cost scale designed to arrive at modern day costs) I suggest the current costs ought to be reduced from market value for the small improvements, especially when there is no indication of a market for used parts. The resulting sum should then be reduced to bring it in line with the general level of assessment of 93%. Thus the Board finds the calculation is as follows:

Estimate of Market Value January 1, 1986	$30,400.00
Less installation of modern heating into the building's second floor (with no allowance for obsolescence)	$ 1,468.00
	$28,932.00
Adjusted for 93%	26,906.76
ROUNDED TO:	$26,900.00

You will note the Board has made no allowance for the apparent extra land taken from Croft Street by the encroachment of the Respondent's building into the street. If the Director is correct and there is no encroachment then the assessment would stand. If the Director is incorrect, then the Respondent has the benefit of some square footage that has not been charged to him under his deed description.

The Board feels little hesitation in accepting the location of the building as being all within the land of the Respondent. It is quite clear that the Respondent has gone ahead and expended funds on this particular building after the fire and sought and received a permit to do so from the Town.

Both parties made representations as to costs. The Respondent argued that he was not sure that he had to be at this appeal hearing and he was not there from choice and that he did not initiate it. The Director has had some reductions from his original assessment, first by the opinion of the assessor

Mr. Tizzard and then by the present amount allowed herein. The valuation could not be arrived at by agreement and there has been some substantial reduction. It was necessary for this Board to bring the assessment of the subject property in line with the general level of assessment. This ought to have been done by the assessor without recourse to appeals. In these particular circumstances and in view of the decision of the Regional Assessment Appeal Court (the rationale for which this Board is hard-pressed to understand), the Respondent was put in the position of defending a decision which may have satisfied him but appears at least to this Board to be absurd and impossible in the face of the legislation as it existed. The Director on the other hand had very little option except to appeal (or to make a collateral attack on the Regional Assessment Appeal Court decision) since it was clear that regardless of whether the building was or wasn't on the property, regardless of whether or not the fire had any effect on valuation as of December 1, 1986, the land in any event would be there as prescribed by the Deed and its ownership and assessment ought to have been left on the roll. The Board goes on further to suggest that even if the fire had been relevant to the valuation herein and even if the shell of the building had cost more to remove then the lot was worth (for example if it would cost $10,000.00 to remove the building, and the lot was worth $4,000.00, the property would be of value to the owner of minus $6,000.00.) - even if those circumstances had prevailed (which the Board feels they do not) the Board feels that the property, in any event, ought to have been kept on the roll at a zero value assessment. That not being the case, the Director had no alternative but to appeal and the Respondent was, perhaps, not experienced enough to know that his response would not likely have had a great deal of effect. In any event, his response to the Director's appeal had some effect. Accordingly in all these circumstances the Board will make no order of costs to either party.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of September, A.D., 1987.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

Director of Assessment v. D. Porter and Son Ltd.

ASSESSMENT--COMMERCIAL AND BUSINESS OCCUPANCY--MARKET VALUE--WHETHER "FULL INVESTIGATION OF THE MATTER"--CHANGE OF POSITION OF PARTIES--COST REPLACEMENT APPROACH--ECONOMIC OBSOLESCENCE--ASSESSMENT ACT, SS. 38, 99, 101(1)--MUNICIPAL BOARD ACT, SS. 4(2), 16(1), 35

This is an appeal by the Director of Assessment from a decision of the Pictou Regional Assessment Appeal Court reducing the 1982 commercial assessment of D. Porter and Son Ltd.'s property at Foord St., Stellarton, from $600,000 to $380,000. This matter had previously been before the Board. The decision at that time had been set aside and vacate by the Appeal Division of the Supreme Court of Nova Scotia and remitted to the Board for a new inquiry. The Board adopts the description of the subject lands and buildings from its previous decision. The Director sought an assessment of $582,950 for the 1982 assessment year. The Assessor's opinion was based on the cost replacement approach.

HELD: The appeal is allowed and the value for assessment purposes for 1982 set at $425,000. The business occupancy assessment is one-half that figure. There is no award for costs.

The Assessment Act nowhere empowers the Board to accept or ratify a settlement arrived at between the parties. When the parties have finished adducing evidence, the Board must be satisfied that a "full investigation of the matter" has been held in accordance with s.101(1) of the Act. The Board had been advised that many more witnesses would be called than were in fact presented. Counsel changed their mind as to the amount of necessary evidence to present to the Board. Counsel do have a duty to make appropriate settlements. Where the evidence adduced by the parties is insufficient to ensure a "full investigation of the matter", the Board might have a power and a duty to inquire further. In this rehearing the Board is satisfied that it has sufficient evidence before it. During adjournments, a second assessor for the Town of Stellarton took into account information not previously available to him and formed the opinion that the factor for economic obsolescence for the subject property should be 30%. The uncontradicted evidence is that the general level of assessment was 83%. The second assessor testified to an estimated value of $425,000. This evidence was uncontradicted and supported in argument by opposing counsel. The Board, after full and due inquiry, accepts this evidence as to market value for the 1982 assessment year. The business occupancy assessment is one-half this figure.

NSMB-59-83-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by the **DIRECTOR OF ASSESSMENT**, from a decision of the Regional Assessment Appeal Court, Pictou Assessment Region, made on May 16th, 1983, respecting the commercial property of **D. PORTER AND SON LIMITED**, in the Town of Stellarton, Pictou County.

BEFORE: RICHARD L. WELDON, Member

COUNSEL: MARIAN F.H. TYSON, LL.B., and
RANDALL R. DUPLAK, LL.B., for the Director of Assessment, the Appellant;

HARRY R.G. MUNRO, LL.B., for D. Porter and Son Limited, Respondent;

VINCENT LAMBIE, LL.B., for the Board.

REHEARING DECISION

By Notice of Appeal which was not dated, received by the Board on May 30, 1983, the Appellant, the **DIRECTOR OF ASSESSMENT,** (hereinafter referred to as Director) appealed the decision of the Regional Assessment Appeal Court, Pictou Assessment Region, which was undated but filed with the Recorder of the Regional Assessment Appeal Court on May 16, 1983, which decision reduced the 1982 commercial assessment of the property of D. Porter and Son Limited, (hereinafter referred to as the Respondent), located at Foord Street, in the Town of Stellarton, Nova Scotia, from $600,000.00 to $380,000.00.

The Appeal was first heard by the Board commencing November 15, 1983 and that hearing resulted in a written decision of the Board dated March 18, 1985, allowing the appeal of the Director of Assessment and setting the value of the Porter property for assessment purposes for the 1982 assessment year at $593,200.00 and the business occupancy assessment for the same assessment year at $296,600.00. This decision is hereinafter referred to as Porter [1].

The subject property consisted at the time relevant to the assessment appealed of one parcel of land with 9 different buildings constructed and occupied on the parcel of land. The decision in Porter [1] fully and accurately sets out all the necessary details concerning the land and buildings as proven in evidence before the Board in this rehearing and the Board will not repeat that description of the lands and buildings here but will, instead, adopt that description as its own.

The Respondent applied for leave to appeal that decision of the Board to the Appeal Division of the Supreme Court of Nova Scotia pursuant to s. 35 of the Municipal Board Act c. 9 S.N.S. 1981. Leave was granted by order of Macdonald, J.A. and the appeal was allowed September 13, 1985. The Judgment of the Supreme Court, Appeal Division, was that "the Order of the Municipal Board is set aside and vacated ... AND ... that the matter be and is hereby remitted to the Board for a new inquiry."

Pursuant to Section 16(1) of the Municipal Board Act, the Chairman assigned Board Member, Richard L. Weldon, to hear the new inquiry (as ordered by the Supreme Court, Appeal Division), at the Board's November 24, 1986, sittings at the Committee Room of the Town Office, Foord Street, Stellarton, Nova Scotia, commencing at 10:00 a.m.

At the opening of the hearing at the time and place scheduled, Mr. Duplak, for the Director, noted to the Board that on Friday last Mr. Gordon, an assessor, had discovered certain hand prepared copies of the assessor's work sheets which had not been erased and which contained certain information prepared for the Board at its last hearing. Mr. Munro, for the Respondent, in almost every forum available to him, had been demanding these work sheets. (They exist in photostat form in Exhibit X-3.) For some considerable time he had been requesting the type of information contained in these worksheets, each time being informed by the Director's representatives, sometimes under oath, that the information did no longer exist or that it could not be found. Mr. Duplak suggested there could be an adjournment to allow the Respondent's solicitor to compare this new discovery with the altered copies of the same cards that had been in the possession of the Respondent for some time. Such an adjournment was made from 10:30 a.m. effectively to 1:00 p.m. the same day. While some counsel were using this time to peruse these various documents, the Board spent a productive 1 ½ hours taking a view of the subject property and some other properties considered by the Respondent as worthy of view being some of the properties listed in the Exhibit X-3.

Mr. Munro moved that ground No. 5 for appeal be struck. After some argument, the Board ruled against any motion to strike that ground of the Notice of Appeal.

After perusing Exhibit X-3 and related documents, Mr. Munro noted his surprise at having Exhibit X-3 put before him at that late date. He argued that the contents were of fundamental importance to the Respondent's case. He stated that the production of these documents at this late stage was an extremely serious matter. He introduced and read from previous correspondence regarding the documents. He undertook to put these documents from which he was reading before the Board in their assembled form of the Case on Appeal put before the Appeal Court. The Board allotted Exhibit Number X-4 to the Case Book which the counsel for the Respondent, with the consent of Mr. Duplak, undertook to procure in certified form from the Registrar of the Supreme Court, Appeal Division. This undertaking was honoured by Mr. Munro during this rehearing on January 27, 1987.

Mr. Munro made the point that the evidence he has been seeking was available in the control of Ms. Tyson at the time of the first hearing before the Board, was apparently altered since that time and was now produced in a written [rather than photostated] form at the start of the new hearing ordered by the Appeal Division.

Mr. Munro said he would be moving for more time to consider this new or resurrected evidence. He contended that the production of this evidence now raised the following issues:

1. Why are the records hand copied?

2. Has somebody within the Department involved in this appeal always known about these records?

3. Have they simply supressed them?

4. Are these records valid or is it that they have been fabricated by somebody within the department?

5. Who wrote them?

6. Why were they written?

7. Why were they only discovered last Friday?

Mr. Munro said he has instructions from the Respondent to make full inquiry into these documents, how they were made, when they were made, and if necessary, make a complaint to the Attorney-General about the delay and repeated "obfuscation" about the production of these documents throughout this whole procedure.

Mr. Munro then moved that the Board order discoveries of all personnel in the Westville assessment department to determine the validity of these documents. The Board has no power to order discoveries and thus did not accede to this request.

Mr. Munro moved for a further adjournment for the purpose of checking the calculations contained in Exhibit X-3 against the various manuals used in valuation of real property in order to estimate or set its market value. The Board ruled that this particular motion was premature because the counsel for the Appellant stated he was not going to use these documents in proving his appeal-in-chief. The Director's opinion was still that the properties listed were not comparables to the subject property and thus were of no interest to the Director. The Director held the firm position that the admission of the evidence contained in Exhibit X-3 would not assist the Board in setting the value for assessment purposes of the subject property. Rightly or wrongly the Director was not going to adduce this evidence. If the Respondent wished to adduce such evidence it was quite free to do so since the Appeal Court had decided it could. The Board informed the counsel for the Respondent that he was free to make this same motion for adjournment when the matter was before the Board raising a question concerning an actual (rather than a hypothetical) situation and he was called upon to cross-examine some witness or otherwise to present his own case for the Respondent.

There being no further preliminary objections, the Appellant, through Ms. Tyson, made an opening statement. She proposed through the evidence of the assessor Merle Gordon and the assessor Sam Farrell to establish the correct market value of the subject lands for the 1982 assessment year. The assessment being sought by the Director was the amount of $582,950.00. According to Ms. Tyson, the Director might have one or two more witnesses but they would likely be called, if at all, on rebuttal.

For the purposes of this appeal the assessor valued the subject property to January 1, 1982 and applied the general level of assessment for the 1982 year. Ms. Tyson submitted that his use of this technique conforms to the Board's opinion of the proper technique to arrive at a market value for assessment purposes as set out in the Moffat case, 1985 Volume 4(A), M.B.D. 390.

Mr. Munro followed Ms. Tyson with his opening remarks. He recounted the history of the assessment of the subject property. The 1980 assessment of the subject property was $368,000.00. In 1981 it was reassessed for a total of over $1,000,000.00. The appeal date was missed for that assessment year. An appeal was filed for the 1982 assessment year. The Regional Assessment Appeal Court in July of 1982 had a hearing. The Assessment Act required that a decision be made within 60 days of the conclusion of that hearing. When no decision of the Regional Assessment Appeal Court had been made in NINE MONTHS a mandamus was taken out forcing the decision (Exhibit X-5) which came out allowing the appeal and setting the amount of the assessment at $380,000.00 for the assessment year 1982. This is the amount the Director is appealing.

As the first witness for the Appellant, Ms. Tyson called Merle Gordon, Hopewell, Pictou County, Nova Scotia. He is the assessor in the Pictou County Assessment Region responsible for setting the assessments in the Town of Stellarton (hereinafter called the Town) - some 2,000 - and, as well, some 3,000 assessments in the rural portion of the assessment region. After hearing his testimony concerning his qualifications both as to education and experience the Board, on motion of Ms. Tyson, found that Mr Gordon was qualified as an expert assessor entitled to give expert opinion evidence before the Board on matters relating to the setting of market values for assessment purposes of properties located in the Town including the subject property.

Mr. Gordon is the author of a written opinion of value of the subject property contained in Exhibit X-1. He did a physical inspection of the subject property before the last Board hearing and also before preparing Exhibit X-1 for this hearing of the Board. Mr. Gordon used the "V Day Method" for valuing the property on each occasion, a Cost Approach Method of valuation which he considered an appropriate method of valuation of the subject property and used a Valuation Day Manual containing costs based on the costs of November 1971 with appropriate formulae for updating such costs. Mr. Gordon said that approach was also used by the Respondent at the last hearing of the Board. The Cost Approach to Valuation requires, according to this witness, a land value [in this case apparently arrived at by the application of a market data approach], and a building improvement value. Those two values are integrated to achieve the total value of the property in question.

Mr. Gordon said that from the value so arrived at certain deductions have to be made for different components, depreciation, functional depreciation - "that type of thing."

Mr. Gordon said he used that technique in this type of case. He set a land value of $.20 per square foot and arrived at a land value of $42,700.00.

In his report, introduced in this examination-in-chief, Mr. Gordon set an assessment value for 1982 for the subject property of $582,950.00. The corresponding value set by the

Board in the previous hearing in Porter [1] was $593,200.00. The 1981 unappealed assessment for the subject property was $1,000,000.00. The appealed 1982 assessment was $600,000.00. The decision of the Regional Assessment Appeal Court for the 1982 assessment year of the subject property was $380,000.00 with which assessment counsel for the Respondent expressed satisfaction.

Counsel for the Respondent conducted a long and detailed cross-examination which he said was not complete when the Board adjourned on November 28, 1986 after a five-day sitting of the Board. At that time, the Board adjourned the rehearing until January 26, 1987, and, based on progress of the appeal to the date of the adjournment, set off all the rest of the working days in January and February 1987 (with the exceptions of January 29th and February 20th) to continue the rehearing. The Board then also provided for the setting of further time, if it appeared to be needed, for February 16, 1987.

On the opening of the adjourned rehearing on January 26th, counsel for both Appellant and Respondent moved that the Board adjourn for the without-prejudice consideration of certain sales information and for negotiations between those two parties with a view to settlement. In view of the perceived demands of this rehearing on the Board's facilities, time and personnel, the Board was more than pleased to adjourn to 10:00 a.m. on January 27, 1987.

At that time, first counsel for the Appellant and later (and separately) counsel for the Respondent requested the Board delay the reconvening of the hearing. They also requested that the Board permit Mr. Gordon, although under cross-examination by counsel for the Respondent, to communicate with counsel for the Director, whose witness he was, to assist counsel in the negotiation proceedings and not for the purpose of being coached by friendly counsel how better to answer questions in cross-examination. Seeing that the active parties to this rehearing advocated this granting of permission for negotiating counsel to communicate with Mr. Gordon to a limited extent and believing that the active negotiations would be expedited by such permission and having observed Mr. Gordon on the witness stand for a period of almost 5 days, the Board assessed him as being a person of character who understood the limitations imposed upon him and who would not abuse any such permission to so communicate. (In this appeal the Board easily accepts that none of the counsel present would abuse such permission). The Board therefore granted such permission believing that to do so would facilitate the just disposal of this appeal.

At 12:00 noon, January 27th, the Board formally reconvened, ratified the previous decisions to adjourn and adjourned on the motion of the same counsel to 2:30 p.m.

At 2:30 p.m. the Board reconvened with Mr. Gordon on the stand. Mr. Munro had no further cross-examination and counsel for the Director had no re-examination. Ms. Tyson called as her second witness Mr. Sam Farrell. After his examination-in-chief, Mr. Munro did not cross-examine him. Ms. Tyson rested her appeal and tendered her exhibits. Mr.

Munro called no evidence and rested his case. Counsel for the Board called no evidence. Counsel for the Respondent and counsel for the Director argued that the Board should accept the evidence of valuation of the subject property given by Mr. Farrell. In argument opposing counsel submitted that each party should bear his own costs. Counsel for the Board did not object to those submissions.

Under s. 4(2) of the Municipal Board Act, the Board shall perform all duties imposed upon it by the Assessment Act R.S.N.S. 1967 c. 14, as amended. Under s. 99 of the Assessment Act the Director may appeal the decision of the Regional Assessment Appeal Court.

S. 101(1) of the Assessment Act then spells out the duty of the Board in hearing an appeal. It states as follows:

> "The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter."

The Assessment Act nowhere empowers the Board to accept or ratify a settlement arrived at between the parties before it. If the Assessment Act does not give the Board power to accept or ratify settlements in assessment matters then the Board has no power to accept or ratify settlements in assessment matters. The Board has dealt with its duties to hear evidence in assessment appeals in the face of agreements of parties before in the case of Re Ben's Limited (1983) 2. M.B.D. 185, a unanimous full Board decision. At page 190 the Board says:

> "Although the parties to the appeal were in

> agreement as to value the Board was obliged to hear evidence as to value by virtue of section 101(1) of the Assessment Act ...".

When the parties who participate in an assessment appeal before it have finished adducing the evidence they wish to adduce, the Board must be satisfied that a "full investigation of the matter" has been held in accordance with s. 101(1) of the Assessment Act. In this rehearing opening remarks from counsel indicated that during the rehearing many more witnesses would be called than in fact were called during the rehearing and that the Respondent would call various witnesses. The thrust of the long cross-examination of Mr. Gordon concerning his valuations of various properties situate in Stellarton (which the Board in the Porter [1] hearing did not allow as being irrelevant) was permitted at this rehearing pursuant to the directions on admissability made by Pace J.A. in the Nova Scotia Court of Appeal's unanimous decision herein which may be found sub nomen D. Porter & Son Limited v. The Director of Assessment S.C.A. 01443. This decision is absolutely binding on this Board particularly for the rehearing of this appeal. The length of this partially completed cross-examination indicated that, at least up to January 26, 1987, considerably more evidence would be called than was in fact called. This additional uncalled evidence was up to that time necessary - at least in the then opinion of counsel - to ensure that a "full investigation of the matter" be held. For whatever reasons, which are outside the purview of the Board, counsel then changed their mind as to the amount of necessary evidence to present to the Board to enable the Board to perform its statutory duty under s. 101(1).

In such circumstances the Board must consider whether this type of behaviour amounts to a "full investigation of the matter" on the part of the Board. If it does not so find, it might have to request counsel for the opposing parties to adduce further evidence, and if they decline, the Board might have to instruct its own counsel to adduce evidence.

In any ordinary appeal the Board must in each case make this same finding but in the usual appeal the opposing parties take a fully partisan position from beginning to end and there can be left no doubt that when the last opposing party finally rests his case a "full investigation of the matter" has been made and has been seen to have been made.

The history of these proceedings leading up to January 27, 1987, recited above would seem to be some indication that this would be a hearing on which a much greater volume of evidence would have been adduced before the final remarks of counsel were made and the parties rested. The first issue for the Board is whether this rehearing, foreshortened as it apparently was, is a "full investigation of the matter" by the Board. The Board looked at the history of the proceedings leading up to the events of January 27, 1987, as appeared on the record and as recited to the Board by all counsel. It looked to the evidence before it as adduced by the Appellant. It assessed and took note of the experience and excellent reputations of all counsel before the Board on this rehearing. The Board is cognizant of the duty of all counsel to avoid litigation if possible and, when not possible, to bring it to a proper termination as soon as it can sensibly be done. The Board has no power to approve or to ratify a settlement. That lack of power in the Board in no way restricts counsel's ever present duty to make appropriate settlements bearing in mind both their client's interests in particular, and the administration of justice, in general.

In a case where the Board detected, or perhaps even suspected, a situation where the evidence adduced by the parties was insufficient to ensure a "full investigation of the matter" it might have power, and a duty, to inquire further into that matter than the active parties before it might wish.

In this rehearing for the reasons set out above, the Board is satisfied on the evidence brought before it and on the arguments made by counsel to it, that it has sufficient evidence before it so as to institute a "full investigation of the matter".

On the evidence before it, should the Board allow or dismiss the appeal? If it allows the appeal what assessment value should be set for the Assessment Year 1982?

The evidence of Merle Gordon and his opinion as to valuation - without benefit of any sales information concerning the subject property - is set out above. He selected the Cost Replacement Approach in setting his valuation and his methods were heavily attacked for over 4 days in cross-examination, not always without effect.

The evidence of Mr. Farrell, who also qualified to give expert appraisal opinion evidence of the values of properties in the Town of Stellarton (His qualifications to do so was advocated to the Board by counsel for the Director and accepted by the Board on the recommendation of counsel for the Respondent. Those qualifications as proven to the Board at this rehearing were accurately summarized in the decision in Porter [1] and need not be repeated here), was accepted without cross-examination by counsel for the Respondent.

The Board summarizes Mr. Farrell's evidence at this rehearing as follows:

1. He had attended most of Mr. Gordon's testimony on this rehearing and listened to certain errors in detail of costing the subject properties which would tend to lower costs and therefore value and consequently the assessment.

2. He was of the opinion that these errors were in most cases set off by other facts of construction ascertained from various sources such as from the evidence of Mr. Porter given at the Porter [1] hearing and minor discrepancies in costing of certain components which would tend to increase costs and thus value and thus consequently the assessment.

3. He was of the opinion that on balance, and in the absence of good evidence of market value of the subject property, the approach used by Mr. Gordon to arrive at his opinion of the market value of the subject property was in accord with the requirements of the then applicable s. 38 of the Assessment Act.

4. During the adjournments mentioned above, for the first time, Mr. Farrell was able to obtain market value figures of a 1984 sale and a 1986 sale of the subject properties. He then had to study those transactions to enable him to form his opinion of the genuineness of these transactions. He then evaluated the information of the tendered sales as indications of actual market value of the subject property. After he had formed his opinion of the relative validity and usefulness for assessment purposes of the information tendered him concerning those sales, he used his opinion formed as a result of such evaluation to test the values shown by the market against the value arrived at by applying the Replacement Cost Approach as used by Mr. Gordon. Shortly before the rehearing, Mr. Farrell had also made a tour of the subject properties and made all inspections he considered appropriate to ensure his opinion as to value would be correct.

With this additional information not previously made available to him, Mr. Farrell was able to form the opinion that the factor for economic obsolescence which should be considered in all valuations of the subject property made under the Replacement Cost Approach should be set at 30%.

Both Mr. Farrell and Mr. Gordon testified that the 1982 general level of assessment for Stellarton was calculated and determined to be 83% of market value and the Board accepts this uncontradicted evidence and finds that the general level of assessment for 1982 was 83%.

In consultation with Mr. Gordon and with this fresh information he was able to assess the subject properties and to arrive at a value pursuant to the then applicable s. 38 of the Assessment Act and his opinion may be stated as follows:

Initial value by replacement costing	$785,856.00
Less 20% for obsolescence	157,171.20
	$628,684.80
Less 30% economic obsolescence	188,605.44
	$440,079.36
Plus land and pavement value	73,669.00
	$513,748.36
Less adjustment 1982 general level of assessment (83%)	87,337.23
	$426,411.13
Rounded to an estimated value of	$425,000.00

[In Mr. Farrell's testimony he ignored the cents].

The Board has listened carefully to the evidence of Mr. Farrell which was uncontradicted and which was supported in argument by opposing counsel. The Board has viewed the subject property and several of the comparables urged on the Board by the Respondent.

After full and due inquiry, the Board accepts the evidence of Mr. Farrell as to the market value of the subject lands for the assessment year 1982 and therefore allows the appeal from the decision of the Regional Assessment Appeal Court and determines the value of the subject property for assessment purposes for the 1982 assessment year to be $425,000.00.

The Board also determines that the business occupancy assessment for the 1982 assessment year is $212,500.00 (one-half of $425,000.00).

The Board wishes to deal with another undertaking, that of Mr. Duplak to keep secure for the Board certain handwritten copies of certain work sheets. In the event, the "originals" of these sheets were never tendered in evidence (although copies were). Mr. Duplak asked, in these circumstances, to be relieved by the Board of any further burden under his undertaking. The Board suggests that his undertaking might be safely discharged when this decision has been issued and when the appeal time herein has passed without an appeal being commenced, or, when any subsequent appeal herein has been finally disposed of. If, pursuant to any Appeal Court decision, this matter were again ordered to be reheard, the "original" copies in the custody of Mr. Duplak might be germane to any subsequent Board hearing.

As urged by Counsel for both the Appellant and Respondent the Board finds each party shall bear his own costs on this appeal.

An Order shall issue accordigly.

DATED at HALIFAX, Nova Scotia this 18th day of February, A.D., 1987.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

City of Halifax v. Director of Assessment and Durham Leaseholds Ltd.

ASSESSMENT--COMMERCIAL AND BUSINESS OCCUPANCY--MARKET VALUE--CAPITALIZED INCOME APPROACH--ADJUSTING BUSINESS OCCUPANCY--ASSESSMENT ACT, SS. 89(1), 100(1), 101(2)--MUNICIPAL BOARD ACT, S. 27(4)

This is an appeal by the City of Halifax from a decision of the Halifax City Regional Assessment Appeal Court reducing the 1984 and 1985 assessments of Durham Leaseholds Ltd.'s Barrington Place from $14,108,000 to $9,019,500. The property is a hotel-commercial complex with 50,631 sq. ft. of retail shopping space on two levels and a 203-room hotel (the Barrington Inn) in the heart of the Halifax Central Business District. The Assessor placed the market value for assessment purposes at $11,161,200 using the capitalized income approach. He calculated a business occupancy assessment for the hotel for 1984 and 1985 of $1,887,900. There was considerable work by all parties in substantially resolving the areas in dispute prior to the hearing.

HELD: The appeal is allowed. The value for assessment purposes for 1984 and 1985 is $11,161,200. The business occupancy assessment for all tenants are to be accordingly adjusted. The Board awards no costs.

The Board is in agreement with the calculation of $11,161,200. All parties have paid sufficient attention to detail to ensure reasonable accuracy and reliability. The capitalization rate of 11% is proper to use for all components of the complex, although individual components were assessed separately. The Board is also satisfied that it has the power to adjust the business occupancy assessments, and should do it for all tenants.

NSMB-131-85-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by the **CITY OF HALIFAX** from a decision of the Regional Assessment Appeal Court, Halifax City Assessment Region, dated December 2, 1985, concerning property known as **BARRINGTON PLACE** in the City of Halifax, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: WAYNE ANSTEY, Q.C., on behalf of the City of Halifax;

MARIAN F.H. TYSON, LL.B., on behalf of the Director of Assessment;

JOHN McFARLANE, Q.C., on behalf of Durham Leaseholds Limited and the Delta Hotels Limited.

DECISION

By Notice of Appeal dated December 30, 1985, and received by the Board on that date, the City of Halifax appealed the decision of the Regional Assessment Appeal Court, Halifax City Assessment Region, made on December 2, 1985, and amended on December 10, 1985, which reduced the 1984 and 1985 assessments of the property known as **BARRINGTON PLACE** in the City of Halifax from $14,108,000.00 to $9,019,500.00. The original Notice of Appeal also included appeals on property known as the Canadian Imperial Bank of Commerce Building and the Royal Bank Building.

These two portions of the appeal were subsequently withdrawn by letter of June 23, 1986.

The property, assessed to Durham Leaseholds Limited, is a hotel - commercial complex consisting of two levels of shopping mall with 50,631 square feet of retail space and a 203 room hotel complex of two full floors, a smaller third floor and includes whirlpool sauna and meeting rooms. A lounge and restaurant are also included in the retail space. The hotel (Barrington Inn) is owned by Delta Hotels Limited. The property is located in the heart of the Halifax Central Business District directly across Barrington Street from the Scotia Square Complex with three office towers, two levels of shopping mall and a parking garage for 1,600 cars and is connected by covered pedestrian pedways. The World Trade and Convention Centre and Metro Centre are within one block.

The hearing of the appeal took place in the Expropriations Compensation Boardroom, Halifax, Nova Scotia on November 16, 1987 and in the Boardroom of the Municipal Board, Halifax, Nova Scotia, on November 18, 1987. The hearing of this appeal had been scheduled on a number of previous occasions but each time it was postponed at the request of counsel.

Mr. Wayne Anstey gave an Affidavit to the Board swearing to service of the Notice of Appeal on all tenants of Barrington Place who were assessed for business occupancy taxes during the 1984 and 1985 taxation years. The Board was satisfied that service was given as required by Section 100(1) of the Assessment Act. There being no objections to the Board's jurisdiction to hear this appeal the Board assumed jurisdiction and heard the appeal on its merits.

Delta Hotels Limited were represented at the hearing as the major tenant of the subject property and had been served a copy of the Notice of Appeal. The Board accepted Delta Hotels Limited as having a real and substantial interest in the proceedings as permitted by Section 27(4) of the Municipal Board Act.

In attendance at the hearing was Mr. Charles J.L. Hardy of Pat King Appraisals who had prepared appraisals for Durham Leaseholds and the Delta Hotels Limited. Mr. Hardy did not give evidence.

Also in attendance was Mr. Denvert P. Levy, Regional Director of Assessment for the Halifax City Assessment Region. Mr. Levy gave evidence as an expert in the matters of assessment. He reviewed in detail his report (Exhibit B-2) in which he stated that in his opinion the market value for assessment purposes for the subject property was $11,161,200.00.

To arrive at the market value for assessment purposes Mr. Levy had used the capitalized income approach, wherein the net operating income is capitalized with an appropriate capitalization rate. He used a capitalization rate of 11% which was the rate used on the Scotia Square Complex. His report stated that "the subject property is part of the Scotia Square Complex with the same management and control as all the rest of the individual components that made up the Scotia Square Complex.

This report had previously been circulated to the Board and to opposing counsel. As there had been some changes to his original report subsequent to its initial filing with the Board, Mr. Levy outlined the new calculations and changes as well as other pages included within the report. These changes had been conveyed to the Board by letter from Ms. Tyson on November 12, 1987 (part of Exhibit B-2). The letter also stated that "the parties have substantially resolved the areas in dispute".

Mr. Levy continued his testimony by reviewing his figures showing the business occupancy assessment calculation for the Delta Inn (Exhibit B-3). In his testimony he indicated that he had apportioned the hotel's share of the fair market value for the property for business occupancy assessment based on a square footage method of calculation even though the market value had been calculated on the capitalized income method which is based on rents. His method of calculation resulted in a business occupancy assessment for 1984 and 1985 of $1,887,900.00.

From the letter of November 12, 1987, and from comments of counsel during the hearing it was evident that considerable work had been carried out by all parties concerned in arriving at final figures in this appeal. The Board is appreciative of this effort and commends the parties for this. It was apparent that the wide difference in assessed values which led to this appeal was caused by a difficulty in arriving at proper figures for a schedule of rents and their economic value, the depreciated value of leasehold improvements and operating expenses and related recovery income.

In addition to the comments of Ms. Tyson concerning this work the Board notes Mr. Anstey's comment that while the City of Halifax is in basic agreement with the final result, there is not total agreement of all parties with all the parts that make up the calculations. The Board also notes Mr. McFarlane's comment that it had been agreed by the parties that their agreement in this case would not constrain any of the parties in future appeals should they be necessary.

Mr. McFarlane made a request on behalf of his client, Delta Hotels Limited, that the Board make a ruling for business occupancy assessment for the years 1984 and 1985 for Delta Hotels Limited and indicated that he felt the Board had the power to do so. He could not specifically agree to the amount in question as he had not received instructions from his client as this situation had only come up the previous Friday. He indicated that he was only making the request on behalf of Delta Hotels Limited, the major tenant for the complex, as he was not authorized to do so for the other tenants.

Ms. Tyson argued that the Board has the power to adjust occupancy assessments and also indicated that she was in agreement with the request. As the Delta Hotels Limited was the only tenant to file a Notice of Appeal for 1984 on business occupancy she was not requesting the Board to adjust for other tenants as they had not formally appealed their assessments.

Mr. Anstey indicated his agreement with the other counsel that the Board had the power to adjust the business occupancy assessments but should also adjust the assessments for all the tenants.

It was pointed out during testimony of Mr. Levy that while the Assessment Act now requires the Director to adjust any occupancy assessments affected by a Board decision it did not do so in 1984 and 1985. In his opinion, he could only adjust 1984 as it was in the first stages of an appeal process but was powerless to change 1985 regardless of the Board's decision as to assessed value of the subject property.

There was further discussion by counsel concerning the powers of the Board to adjust business occupancy assessments and on the use of a rental approach as an alternate method to calculate business occupancy assessment. Mr. Levy further testified that the rental approach was usually used in cases were the value of a property for assessment purposes was calculated by the rental income method. It was agreed that in order to allow Mr. McFarlane time to contact his clients and counsel to further consider the matter, the hearing would be adjourned to Wednesday, November 18, 1987, in the Boardroom of the Nova Scotia Municipal Board.

Immediately subsequent to the adjournment of the hearing it was further agreed by all parties that Mr. Levy would provide a calculation of the business occupancy for the Delta Hotels Limited using a rental approach. This calculation was received by the Board on Tuesday afternoon, November 17, 1987, together with a submission from Ms. Tyson quoting various precedents showing the Board's discretionary power to adjust occupancy assessments and the use of business occupancy calculations based on rent paid by a tenant.

The hearing was reconvened on Wednesday, November 18, 1987. Ms. Tyson reviewed the precedents included in her submission and Mr. Levy gave evidence as to his new calculation for business occupancy indicating that he had reviewed his previous calculations and he was now of the opinion that the appropriate method to use was the rent method. This new calculation arrived at a figure of $1,589,900.00 for business occupancy assessment for Delta Hotels Limited.

The Board has reviewed in some detail the various appraisals prepared on behalf of the participants of the appeal and has noted the calculations of rent, operating expenses, rates of depreciation on leaseholds and capitalization rates used in the different calculations. From the evidence and its own review the Board is satisfied that sufficient attention was paid by all parties to the detail in preparing the final valuation report to ensure reasonable accuracy and reliance on the figures. In accepting the 11% capitalization rate the Board notes the reference to Judge O'Hearn's decision in Director of Assessment v. Halifax Developments Limited, (1983) 55 N.S.R. (2d) 455, in which it is found that it is proper to use the one rate for all components of the complex, although the individual components were assessed separately. He states, in part, at page 519 (163):

> "that the complex should be valued as a whole on the basis of a single capitalization rate."

The 11% capitalization rate accepted by Judge O'Hearn was based on the use of economic rents as was the case in this appeal. The Board finds that Barrington Place is part of Scotia Square Complex with the same management and control.

The Board is in agreement with the calculation of the 1984 assessment for Barrington Place in the amount of $11,161,200.00.

The Board has reviewed the information provided concerning its powers relative to the adjustment of occupancy assessments. Section 101(2) of the Assessment Act gives the Board the powers of the Regional Assessment Appeal Court. The powers of the Regional Assessment Appeal Court as laid out in Section 89(1) state:

> "On any appeal, the court may
>
> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed;"

The Board is satisfied that it has the power to adjust occupancy assessment and is also of the opinion that it should adjust assessments for all tenants concerned not just Delta Hotels Limited.

From its review of the cases cited by Ms. Tyson, the Board is also satisfied that this case law, as it relates to assessments calculated on the income approach, is in favour of the determination of business occupancy assessment by a percentage of rent method as opposed to a percentage of space occupied method and accepts the rental method as appropriate in this case.

The Board determines that the appeal of the City of Halifax from a decision of the Halifax Regional Assessment Appeal Court should be allowed and that the value for assessment purposes for 1984 and 1985 of property known as Barrington Place, 1895 - 1897 Barrington Street, should be increased from $9,019,500.00 to $11,161,200.00.

The Board also determines that the business occupancy assessment for the years 1984 and 1985 for all tenants of the subject property be adjusted to reflect the above assessed value of $11,161,200.00 using a rental method of calculation.

The Board is conscious of the equal contributions and co-operation of all the parties concerned toward the development of the evidence to support the final figures to be used in this appeal and therefore awards no costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 1st day of December, A.D., 1987.

MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Hebb v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--MARKET DATA APPROACH--COST APPROACH--ASSESSMENT ACT, SS. 38(2), 39(2), 101(1)--MUNICIPAL BOARD ACT, S. 16(1)

This is an appeal by L.A.H. from a decision of the Lunenburg Regional Assessment Appeal Court confirming the 1987 assessment of the Appellant's property and single-family dwelling at Martin's Brook in the amount of $159,300.00. The property is in a rural area about 4 miles from the Town of Lunenburg, contains approx. 80,000 sq. ft. and is on a steep slope with an excellent view over Prince's Inlet, Mahone Bay, though on the opposite side of the highway to the water. The Senior Assessor estimated the market value as $161,800, while the Appellant's position was that the assessment should be $154,300. There are two rights-of-way across the property. The Appellant was of the opinion that the amount she could obtain on the sale of the property was in excess of any of the values discussed at the hearing.

HELD: The appeal is dismissed. The Board finds the market value for assessment purposes to be that set by the Director, less a nominal figure for the right-of-way. There will be no costs.

The Board accepts the Assessor's valuation arrived at by the market data approach. The Board could do nothing else in the face of the frank evidence as to the Appellant's personal valuation of the property. In the absence of evidence as to the quantum of diminution in value because of the right-of-way, the Board can only allow a nominal figure of $100. The Board would have liked to take the cost of reproduction approach to valuation since all other residential properties in the municipality essentially are set by the same technique, but without further information the market data approach is best.

NSMB-149-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by **L. ANN HEBB** from a decision of the Nova Scotia Regional Assessment Appeal Court, Lunenburg Assessment Region, dated May 27, 1987, which decision confirmed the Appellant's assessment at $159,300.00 for property and single-family dwelling at Martin's Brook, Lunenburg County, Nova Scotia.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: HIS HONOUR JUDGE ROBERT C. HEBB, on behalf of the Appellant, L. Ann Hebb;

RANDALL R. DUPLAK, LL.B., on behalf of the Director of Assessment.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S., 1981, Municipal Board Act, the Chairman assigned Board Member Richard L. Weldon to hear this assessment appeal at the Board's November 13, 1987, sittings at the Council Chambers of the Municipality of the District of Lunenburg, 210 Aberdeen Road, Bridgewater, Nova Scotia.

This is an appeal by **L. ANN HEBB**, married woman, from a decision of the Regional Assessment Appeal Court, Lunenburg Assessment Region, dated May 27, 1987, which decision confirmed (without mentioning the amount) the Appellant's assessment for the property and single-family dwelling located at Martin's Brook, Lunenburg County, Nova Scotia. The assessment set by the assessor for the dwelling and property was $159,300.00.

The Notice of Appeal was undated and was received by the Board on June 23, 1987. The Notice of Appeal stated that the decision of the Regional Assessment Appeal Court was received by the Appellant on May 28, 1987. The Notice of Appeal is before the Board as Exhibit H-1. The grounds for appeal stated in the Notice of Appeal are as follows:

> "(1) The Appellant and her husband have been long-term friends of the Chairman of the Lunenburg Nova Scotia Regional Assessment Appeal Board, David Theakston, had originally indicated that he would not hear the appeal; however, when the time came for the appeal, he was present and heard the appeal. The Appellant feels that an independent person should have been appointed to hear the appeal.
>
> (2) The Appellant's property, situate at Martin's Brook, in the County of Lunenburg, is over assessed in comparison to two adjacent properties and several others in close proximity."

The Appellant was represented by her husband, His Honour Judge Robert C. Hebb, and proved appropriate service of the Notice of Appeal and Notice of Hearing. The Board is satisfied that the Appellant has properly carried out all the procedural requirements under the Assessment Act, R.S.N.S., 1967, Chapter 14. The Board therefore assumed jurisdiction to hear the appeal on its merits.

Judge Hebb gave the evidence for the Appellant and also made argument.

Mr. Duplak for the Director called one witness the Senior Assessor, Lynn Wamboldt. At the conclusion of the evidence both parties made argument.

The subject property is in the assessed ownership of the Appellant, L. Ann Hebb and it is located at Martin's Brook, a rural area of Lunenburg County about 4 miles from the Town of Lunenburg. The lot of land is rectangular in shape, being 228.93 feet across its frontage and having an average depth of 352.0 feet. The lot contains approximately 80,000 square feet and lies on the western side of the unpaved public highway. On the side of the public highway farthest from the site is an arm of Mahone Bay, Prince's Inlet. The Appellant's house is located on a steep slope with an excellent view over Prince's Inlet. The lot itself is traversed by two rights-of-way which are probably graphically shown on Schedule "F" of Exhibit H-5, the Valuation Report, being approximately 15 feet in width. There is one right-of-way which appears to run very close to the southernmost boundary line of the subject lot and runs from the back to the front of the lot. This is intersected by a somewhat wider right-of-way running diagonally across the front of the lot from the public highway to intersect the first mentioned right-of-way almost half-way back. The house located on the subject lot is a year round house although there are other properties in the neighbourhood that are used as recreational or seasonal premises.

The evidence shows that the date selected for assessment purposes by the Director pursuant to Section 38(2) of the Assessment Act was January 1, 1986.

The amount of assessment being appealed was $159,300.00.

The estimate of market value for assessment purposes of the Appellant's property made by Mr. Wambolt contained in Exhibit H-5 is $161,800.00.

Judge Hebb stated that his client's position was that the assessment should be $7,500.00 less than the figure of $161,800.00, namely $154,300.00. Judge Hebb reiterated his objection stated in his Notice of Appeal that the person who heard the appeal in the Regional Assessment Appeal Court had been an inappropriate person to hear the appeal. He then withdrew that particular ground, ground of appeal number one, on the theory that the Board had no jurisdiction to deal with that matter. The Board fully concurs with this view and holds the opinion that, if the Appellant had any remedy in that direction, it should have been pursued in some other forum other than the Board. This Board merely has the function of hearing the appeal de novo pursuant to Section 101(1) of the Assessment Act which reads as follows:

> "The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter".

The Board notes however that this particular feeling by the Appellant as expressed in the withdrawn portion of the Notice of Appeal may give some indication of why this matter of a $5,000.00 differential on a $159,300.00 assessment is being heard at the Municipal Board level rather than as an ordinary residential property appeal being fully taken care of at the Regional Assessment Appeal Court level.

The Board realizes it has a duty to hear this appeal but notes that a person can have a residential assessment appeal disposed of at the Regional Assessment Appeal Court level without risk as to costs. Costs first become at risk in assessment appeals at the Municipal Board level.

Judge Hebb testified that the Appellant's assessment went in the following progression:

Assessment for 1984	$107,000.00
Assessment for 1985	$107,000.00
Assessment for 1986	$109,500.00
Assessment for 1987	$159,300.00

At this hearing for the same assessment the Director claims an increase to $161,800.00 which Judge Hebb calculated to be approximately a 45% increase over the assessment in 1986. Judge Hebb took extremely strong umbrage with the fact that when his "client" appealed to one level of appeal her valuation was raised and as soon as the appeal to the Board was commenced another increase in assessment was sought. After each taxpayer expression of dissatisfaction with her assessment Judge Hebb said the assessors came back and re-valued the Appellant's property.

Judge Hebb testified as to the comparables mentioned in Exhibit H-6 and made his own comparisons to the comparables therein and said that some of them shown in the Report, H-6 had been changed radically between the time the assessments were put on and the photographs were available. Judge Hebb said that in each case the properties were in superior condition in the photographs then they had been at the time they were assessed. In respect to his wife's property, he noted that the road up the hill is a right-of-way used by the two people living on land located behind her property and that one of the people located behind her lot has an auto repair business which generates a fair amount of vehicular traffic through the right-of-way. None of the other properties used as comparables appeared to be subject to any rights-of-way. Judge Hebb noted that Herman's Island (near the subject property) was accessible by bridge and the vacant land there cost $50,000.00 per lot for lots with water frontage with no intervening road way. He notes that the waterfront on the Appellant's property which is on the other side of the highway is very good for scenic purposes but not much good for boating and other water uses because the hill is so steep on the far side of the highway. Judge Hebb notes that the Appellant's lot is steep and it is hard to get to her property in the wintertime. Judge Hebb often has to walk in bad weather conditions from the road to the house.

Both Judge Hebb, and later Mr. Wamboldt, the assessor, had particular reference to the sale number three in the comparables listed in Exhibit H-5, which is found on page 23 and that was a property purchased on May 6, 1983, the sale price at that time was $135,000.00. It was later adduced that this comparable had been sold in 1987 for $195,000.00. It has been assessed at $160,400.00. This particular property contained an office building of some 360 square feet in addition to its residential component. It also was on the opposite side of the road from the sea but the seafront was accessible and usable for boating as was apparent from the photograph.

Mr. Lynn Wamboldt giving evidence for the Director basically outlined and dealt with Exhibit H-4 which is his valuation report in which he formed the opinion that the subject property had a market valuation of $161,800.00 as of August 10, 1987. On page 2 of that report, he had the following mis-statement of the applicable law:

> "...the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

On questioning by the Board, he noted that he applied the appropriate test under Section 38(1) of the Assessment Act of which a part is extracted here:

> "...but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the town or municipality."

Mr. Wamboldt said that regardless of what his report says in fact he carried out the uniformity requirements of this Section and this is conceeded by the Appellant.

The report of the assessor shows that the site was serviced by a private drilled well and on-site sewage disposal. Judge Hebb said that he had purchased the oversized lot in order to obtain health approval for the on-site sewage disposal and drilled well. The public highway in the area is sand sealed rather than paved. The report says that the subject site is typical of the building lots in the immediate area.

Although actual access to the shore is difficult due to the steep slope, the positioning of the house on the lot provides a very appealing view of the water of Prince's Inlet, in the very popular recreational area, Mahone Bay. At page 8 of the report the building itself is described and certain excerpts may be taken from that report because they are not in dispute and the photographs tendered with the report tend to corroborate it.

> "The building is a single family dwelling of one storey with full basement, gable roof and irregular in shape. The building was constructed in 1979 and has been well maintained since construction."

Regarding the calculations of square footage made in the report, the Board will deal with the matter of square footage in some detail later.

The report indicates the subject building is not of the typical design of most residential properties in the area. It is irregular in shape, constructed of good quality materials and workmanship and provides an attractive and efficient utility interior living area. The report then goes on to list all the details of the construction which are not too germane to this particular appeal because they are agreed on by all parties. The area in which the subject property is situate is unzoned and municipal services are typical of a rural area.

The report rejects valuation of the property by income technique. It does value the Appellant's property by the cost approach to value and it also values it by market data value approach. The assessor has selected the direct sales approach as the approach appropriate in this appeal and arrives at his value previously stated. His cost approach value amounts to $157,600.00.

In the cost of reproduction approach Mr. Wamboldt gave a total land value of $53,700.00. Judge Hebb's view was that the Herman Island property facing on the shore would be a lesser front footage but it would be the same price as the subject lot as Herman's Island contains superior properties. Judge Hebb dealt with his Herman's Island's comparables on a lot to lot comparison and did not translate the comparisons into square footage comparisons.

There are three comparable sales selected by Mr. Wamboldt to compare with the subject property:

Sale No. 3 is about ¼ mile line of sight from the subject property and it is agreed on by both parties as being an appropriate comparable.

Sale No. 2 in a direct line would be in the Board's estimation four or five times as far from the subject site as Sale No. 3.

Sale number 1 would be eight to ten times as far from the subject site as Sale No. 3 judging by estimation of the diagram contained in Schedule D of Exhibit H-5.

Judge Hebb testified that sales were sparse in the area and he mentioned an attempted sale of the land behind the Appellant's. This rear land was assessed for $130,000.00 and listed for sale at $185,000.00. When it was not sold at $185,000.00, it was listed for $245,000.00. Perhaps it is understandable, if this is the typical listing practice, why house sales are slow in the area.

The assessor, Mr. Wamboldt did not make any reduction on the Hebb property for the presence of two rights-of-way, one running diagonally across its front and did not make any addition to the rear properties serviced by those rights of way in their assessments.

The Board takes note of Section 39(2) of the Assessment Act which reads as follows:

> "Where there is an easement or right of way appurtenant to any land, the assessment of the dominant tenement shall be increased by the added value that in the opinion of the assessor it receives from the easement or right of way and the assessment of the servient tenement shall be reduced by the amount that in the opinion of the assessor the value has lot because of the easement or right of way."

The assessor expressed the opinion before the Board when questioned on this particular aspect that he felt the rights-of-way did not in any way diminish the value of the Hebb property and did not increase the value of the property located behind the Hebb property and serviced by these rights-of-way.

The assessor said that in his assessment region and as far as he knew perhaps in other assessment regions in the Province, the valuations arrived at on the assessor's work cards were determined by the department applying the cost approach to come to an assessed value. These values, of course, were tested as occasion arose by actual sale prices that became available.

The Board notes in passing that almost invariably and certainly in most of the texts on valuation the market data approach is recommended as the best method of arriving at market value of a given property. The Board notes also that in this case as in many others before it that the value arrived at by applying the market data approach and the cost of reproduction cost approach are often different although in strict theory they should probably arrive at the same result in each case. The Board wonders whether or not (in view of the principle of uniformity required in Section 38(1) of the Assessment Act) to assess the subject property on a market data approach basis and to assess almost all the other residential and resource properties in the municipality on a cost approach basis might be some breach of the uniformity rule.

Judge Hebb was of the opinion that the market price that he could obtain from his wife's property should she wish to sell it would be (and certainly the asking price, would be) in excess of any of the values discussed at the hearing.

Judge Hebb testified that the square footage shown on his building plans were some 1,400 square feet but he did not produce the plan on which this square footage was said to appear. Mr. Wamboldt used 1634 square feet as the base of his calculations.

The Board has reviewed the evidence and listened to all the representations and is satisfied, that barring the questions of the rights-of-way, the market value at least in the mind of the assessed owner is in excess of any of the figures quoted here today in this appeal.

The Board is satisfied that the assessor, regardless of what his report says, has arrived at the correct general level of assessment of some 90% by comparing the correct figures and that is the general level of assessment for the Municipality of the District of Lunenburg.

In view of the circumstances explained by Judge Hebb, the Board would like to take the cost of reproduction approach to valuation arrived at in this particular case and set the assessment at that level since all other residential properties in the municipality essentially are set by the same technique and they are only translated into market data approach when an appeal becomes imminent and the Director sees the necessity of applying the market data approach to a given property. The Board unfortunately has no statistics before it to deal with its general impression, perhaps gained in this appeal as well in others, to contradict on the basis of uniformity the criteria that the market data approach is the best approach to valuation in Nova Scotia assessment matters. Somewhat reluctantly then the Board will not accept the valuation arrived at by the cost approach in this appeal.

Again, with the exception of the possible effects of the ignored rights-of-way, the Board accepts Mr. Wamboldt's valuation arrived at by the market data approach. The Board could do nothing else in the face of the frank evidence as to his wife's apparent personal valuation of the property vicariously delivered by Judge Hebb.

Neither Judge Hebb nor Mr. Wamboldt could give any figure for the subtraction of the cost of the right-of-way "blemish" on the subject property from the Hebb assessment or for that matter the addition of the value of the rights-of-way to the properties behind the subject property. The Board is clearly of the view that had it evidence of the diminution or increase, this evidence should have been considered in relation to the subject property but in the absence of the evidence of quantum the Board is unable to set a figure and therefore can only allow a nominal figure of $100.00 for diminution of the value of this right-of-way across the face of a scenic property.

As to the square footage of the subject property (which is important in the calculations using the cost approach), the Board is unable to take any figure other than that given as the calculation by the assessor. Had the plan been available as the best evidence available showing a different square footage the Board would have had to take cognizance of a lesser square footage. At the moment the Board accepts the square footage as set out in the report of Mr. Wamboldt. In any event the square footage only affects certain of the adjustments with the comparbles.

The Board as well notes Judge Hebb's comments concerning what, in effect, is a cross-appeal by the Director. Without regard to the formal filing of a cross-appeal, the Director can have the benefit of cross-appeal at this hearing without stating so in writing in advance. The Board notes Judge Hebb's comments that this puts a heavy deterrent to a taxpaying citizen who wishes to appeal his assessment although the Assessment

Act provides for such a deterrent. The Board under its present legislation can do nothing but allow this de facto cross-appeal process to continue since it is as contemplated in the Assessment Act.

For all the above reasons the Board finds the market value of the subject lands for assessment purposes as of the date set by the Director, namely January 1, 1986, to be $161,700.00.

There will be no costs to either party.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 14th day of December, A.D., 1987.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

Lordly v. Director of Assessment

ASSESSMENT--WHETHER RESIDENTIAL OR RESOURCE--MARKET VALUE--141 ACRES--DIRECT SALES COMPARISON APPROACH--ASSESSMENT ACT, SS. 1(ca),(ea),(eb),(fa),(naa),(nb), 25(1), 89(1), 91, 100(1), 101

This is an appeal from a decision of the Halifax City Regional Assessment Appeal Court confirming the assessed value of property at Lakeside, to the rear of Susie Lake. The 1985 assessment described the subject property as being 95 acres classified as Resource-General and assessed for $9,500. An amended assessment notice was later issued for 150 acres. It classified the property as Residential and assessed it for $101,300. The evidence before the Board is that the portion of the subject property within the City is 141.1 acres, of which 11.5 acres are subject to a Nova Scotia Power Corporation easement.

HELD: The appeal is allowed and the 1985 and 1986 assessments shall be $91,400. The subject property is classified as Resource. No costs will be awarded.

The Board is to inquire into this matter de novo (s.101 of the Assessment Act). The Assessor used the direct sales comparison approach to value the subject property and the Board accepts the Assessor's opinion that the value of the portion of the property not subject to the Nova Scotia Power Corporation easement should be $675 per acre and that of the lands subject to the easement should be $337.50 per acre. The Appellant submitted no other comparable sales in evidence and no alternative adjustments to those applied by the Assessor to his comparables. The Board prefers the analysis and conclusions of the Assessor to those presented by the Appellant. On the matter of the classification of the property, the Board cannot agree with the Assessor who classified these lands as Residential. When the current use of the property is clear (in this case, as forest property) and no other intent on the part of the owner is proven, the classification should reflect its use. Classification should not be determined by the zoning as an owner may apply and be successful in having it rezoned. Resource may be an unusual classification in the City but it appears to be the most appropriate.

NSMB-137-86-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967 Chapter 14

- and -

IN THE MATTER OF: An Appeal by Frederick Lordly, Trustee of the Estate of George R. Lordly from a decision of the Regional Assessment Appeal Court, Halifax City Region, dated March 17, 1986, which confirmed the 1985 assessment of lands at Lakeside assessed to the Estate of George R. Lordly.

BEFORE: ELIZABETH SALTON, Vice-Chairman

COUNSEL: JAMES R. MORRIS, LL.B., for the Appellant

MARIAN F.H. TYSON, LL.B., for the Director of Assessment

DECISION

A hearing by the Board took place in the Expropriations Compensation Boardroom, 9th Floor, 1660 Hollis Street, on August 26 and 27, 1986 on an appeal by Frederick Lordly from a decision of the Regional Assessment Appeal Court, Halifax City Region, dated March 17, 1986, which confirmed the assessed value of property at Lakeside, at the rear of Susie Lake, Assessed to the Estate of George R. Lordly. Notice of Appeal (Exhibit L-1) dated April 30, 1986 was received by the Board on the same day.

The grounds of appeal set out in the Notice of Appeal are as follows:

"1. The decision of the Regional Assessment Appeal Court is not supported by specific and sufficient reasons;

2. The City of Halifax assessment and the decision of the Regional Assessment Appeal Court are based on incorrect findings of fact including, but not limited to, the size of the assessed property;

3. The City of Halifax assessment and the decision of the Regional Assessment Appeal Court are based on an incorrect or inappropriate classification of the assessed property;

4. The City of Halifax assessment and the decision of the Regional Assessment Appeal Court are so unreasonable that no reasonable authority could ever have come to them from a proper consideration of the facts;

5. Such other grounds of appeal as may appear."

The decision of the Regional Assessment Appeal Court, signed by the Chairman and dated March 17, 1986, was mailed by the Recorder March 27, 1986. The decision states:

> " On hearing the Appellant, Mr. Lordly, and the Assessor, Mr. Caiger, and on reviewing the particulars of this property and its assessment, I find that this assessment must be confirmed."

The Board having been satisfied that service of the Notice of Appeal was in compliance with Section 100(1) of the Assessment Act and that Notice of Hearing had been properly served, proceeded with the agreement of the parties, to hear the appeal on the merits.

Counsel for the Appellant called the Appellant and one other witness. Counsel for the Director called the Assessor, a Mapping Technician and the Assistant Regional Director of Assessment for the Halifax County Region.

Frederick Lordly, Trustee of the estate of his late father George R. Lordly, manages the exporting business of George R. Lordly Limited, started by his father approximately 50 years ago. While his father was alive, the company had contracted timberlands and bought raw lumber, a practice his son no longer carries on. In the course of acquiring various parcels of land for his lumber business, Mr. Lordly's father had purchased at a tax sale in 1967 a 200 acre parcel of "raw land" located at Lakeside between the St. Margaret's Bay Road and the Bicentennial Highway in the Municipality of the County of Halifax. The land was never used for lumbering purposes. A portion of the 200 acre block was annexed to the City of Halifax by Order of the Board of Commissioners of Public Utilities dated June 9, 1983. It is the assessment of the portion of the original 200 acre parcel now within the City of Halifax which is under appeal.

Frederick Lordly has walked some of the subject property which he reached from the direction of the St. Margaret's Bay Road. He said that he did not find any boundary markers and never found the public road said to exist at the south side of the subject property.

Mr. Lordly confirmed that the 1985 assessment notice from the Halifax City Assessment Region for the subject property under appeal (Exhibit L-8) described it as "Land 95 acres - Thomas Kirby Grant - Lakeside" which was classified as Resource - General and assessed for $9,500.00. Exhibit L-8 was dated January 28, 1985. Exhibit L-9 was an "Amended Assessment Notice (Section 84)", dated November 28, 1985, from the Halifax City

Assessment Region, describing the property as "Lakeside Rear of Susie Lake Bicentennial Highway", classified as Residential and assessed for $101,300.00. Mr. Lordly stated that the 1985 amended assessment notice was for a parcel of land of 150 acres rather than the amount of 95 acres set out in the first 1985 notice. According to Mr. Lordly there had been no change in the use or character of the land in that interval although the amended notice showed a different size, classification and assessed value.

Mr. Lordly confirmed that Exhibit L-10 was a letter containing appraised values of those properties which were part of his father's estate. The letter, dated January 21, 1975, from T.J. Davis with the United Trust Company in Halifax to Mr. M.G.Oddy, of the Canada Permanent Trust Company of Halifax, described "200 acres of land at Lakeside" as having an assessed value of $5,000.00 as of May 1, 1974. Mr. Lordly stated that Mr. Davis at the time the letter was written was an accredited appraiser but no longer practiced and so could not testify. He believed that it was unlikely that Mr. Davis had cruised the property.

Mr. Lordly contrasted the 1985 assessment notice from the Halifax County Assessment Region for a 105 acre portion of the property assessed as Resource General at $10,500.00 which he thought was "fair" with the amended notice of assessment from the Halifax City Region for a 150 acre portion of the property assessed as Residential at $101,300.00 which he thought was "incredible".

In cross-examination, Mr. Lordly was referred to a copy of the tax deed for the 200 acre property acquired by his father, contained in Exhibit L-3 as Schedule "A", which describes the property as follows:

> "BEGINNING on the northern side of the road leading from St. Margaret's Bay to Halifax opposite the north west angle of a tract of land lately passed to James Geeser;
>
> THENCE to run north twelve degrees west on vacant land sixty-seven chains;
>
> THENCE north eighty-three degrees west thirty chains;
>
> THENCE south twelve degrees east seventy chains to the said road;
>
> THENCE following the course thereof easterly to the place of beginning.
>
> BEING that same lot of land granted to Thomas Kirby by Crown Grant dated the 12th day of June, A.D. 1821, and recorded at the Crown lands Office at Halifax in Book K at page 21."

Mr. Lordly said that he had spoken to the former Deputy Minister of the Department of lands and Forests who did not know of the road referred to in the description, but he had not spoken to anyone in the Department of Transportation about the existence or status of the road. Mr. Lordly said that he had not been on the road maintained by the Nova Scotia Power Corporation on its easement across the property. Asked if he was aware of an old woods road from Geizer's Hill to Susie's Lake, Mr. Lordly said that the route he used to reach the property from the Bicentennial Highway might have been along that woods road.

Mr. Lordly agreed that it was possible that there might be development in the area of the subject property in the future but he did not expect this to be a possibility for 10 or 15 years.

A letter from John Mullally, then Deputy Minister of Lands and Forests, to Mr. Lordly dated July 18, 1986, filed as Exhibit L-11, appeared to be in response to a letter from Mr. Lordly to a Mr. Eldridge who had recently retired from the Department. The letter stated that the Department was not actively purchasing forest land at that time but that a completed form would be kept on file for future reference. Mr. Lordly stated that his enquiry about possible purchase of the subject property had been an attempt to establish the value of the property.

Janis Meschino, a sales consultant employed by Crossroads Realty for two years working principally in Halifax and the St. Margaret's Bay area, was called by the Appellant and commented on the report by the assessor (Exhibit L-2) which she had read briefly. Ms. Meschino stated that she was familiar with the general area in which the subject property was located and with properties in its vicinity. She acknowledged that she was not qualified as an appraiser, that she had taken a 2-week course before writing an examination to qualify as a licensed real estate agent, that she was not expert in valuing forest land and that the majority of her real estate experience was with residential properties. Ms. Meschino was accepted by the Board as a licensed real estate agent with two year's experience who was generally familiar with the area.

In Ms. Meschino's opinion a potential purchaser interested in residential development of the subject property would need direct deeded access to a public highway as well as electrical power and sewer and water services. She believed that the subject property was 1½ kilometres distant from the rear of the Lakeside Industrial Park which she did not think would be the most attractive access to a residential development. She referred to a letter addressed to James R. Morris from F. Holden, Chief Engineer with CBCL Limited, dated August 26, 1986, filed as Exhibit L-6, which estimated the cost of an access road to the subject property. Assuming a road distance of 2 kilometres "from the center of the property to either the existing road in Halifax County's Industrial Park or to Trunk 3 west of Six Mile Lake", Mr. Holden estimated that an access road would cost a minimum of $350,000.00 and "for reasonable vehicle access" could cost in excesss of $550,000.00.

Ms. Meschino stated that the residential market in Lakeside now consisted primarily of modestly priced properties. She believed that the subject property would only be developable in 10 years perhaps and would be purchased by a developer only if it was inexpensive. She disagreed with the value of the property determined by the assessor, Rodney Caiger, as set out in his report prepared for this hearing. (Mr. Caiger estimated the market value of the subject property in total, as of January 1, 1983, to be

$126,900.00 which was made up of 58.9 acres in the Municipality of the County of Halifax, valued at $35,500.00, and 141.1 acres in the City of Halifax valued at $91,400.00).

Ms. Meschino commented on the three properties which were used as comparables by Mr. Caiger in arriving at an assessed value of the subject using the Direct Sales Comparison or market value approach.

Sale #1 in Exhibit L-2 was made up of three blocks of land totalling 1758 acres in the Ragged Lake - Bayers Lake area of the former city watershed, which were purchased July 9, 1984, by the City of Halifax from the Public Service Commission of Halifax for development by the Halifax Industrial Commission. The price per acre was $1350.00. Ms. Meschino stated that the City's motive in purchasing this property was not to make a profit. She was not in a position to comment on the 40% reduction in value because of physical characteristics made by Mr. Caiger, which she felt was a value judgement which did not accurately compensate for the difference in value of Sale #1 which had extensive road frontage on the Bicentennial Highway, Highway 103 and Route 333 (the Prospect Road) as compared with the subject property which is "landlocked".

Sale #2 was two parcels of land totalling 210 acres, each with frontage on Tomahawk Lake in the Pockwock Watershed, purchased by the Public Service Commission of Halifax from G. Royce Hefler January 3, 1986 as additional lands for the new Public Service Commission watershed. These lands which have no road frontage or services available were sold for $600.00 per acre. Ms. Meschino said she was not personally familiar with Sale #2 but she was of the opinion that these lands were purchased for purposes other than making a profit. She felt that the extent of the lake frontage of these lands was initially important to the Public Service Commission whose aim of protection of the quality of the water resource of Tomahawk Lake would be a more important consideration then the lands' price. The 35% adjustment in value made by Mr. Caiger to Sale #2 was the result of those lands' remoteness. Ms. Meschino felt the amount of that adjustment was entirely a value judgement arrived at by the assessor.

Sale #3 was a property of 279 acres located on the Hammonds Plains Road at the Lucasville Road, which was purchased December 16, 1982 by Northland Mobile Homes Limited from the Estate of Samuel Haverstock for $122,000.00 or $437.27 per acre. These lands have no road frontage and are accessed from the Hammonds Plains Road by a 66 foot right-of-way. Two Nova Scotia Power Commission easements cross the property. Ms Meschino felt that the location of Sale #3 was quite different from that of the subject property because of the extent of residential development along the Hammonds Plains Road with houses nearby in Uplands Park and Highland Park being valued in the $100,000.00 range.

Ms. Meschino said that her "absolutely top dollar" valuation of the subject property would be based on $250.00 per acre, giving a total value for the 200 acre parcel of $50,000.00. She derived this value from other woodland properties which she was aware of from her real estate office. Ms. Meschino had increased her original value per acre for the subject from $50.00 per acre to $250.00 per acre because of the opinion of an associate broker, Mrs. Clarke, who thought that there was a remote possibility for development of the subject because of a shorter distance from public roads. Ms. Meschino's original opinion of value is set out in her letter to Mr. Lordly (Exhibit L-13) dated August 20, 1986, as follows:

> "Dear Mr. Lordly:
>
> Re: Parcel of Land, Land Registration I.S. #404624
>
> With reference to your parcel of Land LRIS #404624, I find it difficult to establish any market value for this property as it is totally inaccessible, at least 3 miles inland from the Lakeside Industrial Park, with three other properties in between.
>
> To utilize this land for any residential development deeded right of way would be required over three properties and a roadway of at least 3 miles would have to be constructed. You can see that this would make this property extremely unattractive to a potential developer.
>
> With this in mind I would recommend that the best use for this land is as woodland and its value would be primarily in the development of the trees.
>
> I estimate its' value at $50. per acre.
>
> Yours truly,
>
> Janis Meschino
> Sales Consultant"

In cross-examination by Counsel for the Director, Ms. Meschino acknowledged that "serviced access" was the key factor in forming her opinion of value of a property. In the case of the subject property her principal concern was the distance from the subject to a serviced road. Ms. Meschino acknowledged that she had "just recently" learned of a service road from the Lakeside Industrial Park to the center of the subject property and that she had not been aware of a legal public access to the subject Ms. Meschino stated that whether the existence of a legal road allowance leading to the property would alter her opinion of the property's value would depend on its location because the length of the necessary access road would still be costly to construct.

Ms. Meschino agreed that the distance of three miles between the subject property and the Lakeside Industrial Park stated in her letter (Exhibit L-13) was in error. She recalculated the distance, scaling it on a map and concluded that it was 1.5 kilometres.

The $250.00 per acre value for the subject property given in evidence by Mrs. Meschino was a "considered joint opinion" of Ms. Meschino and Mrs. Clarke, her real estate colleague. The revised figure recognized the proximity of the industrial park and the possibility of the subject property being developed industrially.

Ms. Meschino agreed that public bodies such as the Public Service Commission and the Halifax Industrial Commission probably purchased property on the basis of appraisal reports, and stated she was not aware of any special circumstances which would have convinced these purchasers to pay more than market value. Ms. Meschino said she did not know of any better comparables than those used by the assessor in his report.

Counsel for the Director called Nancy Saunders, a mapping technician for 1½ years with the Halifax City Assessment Region Office. Ms. Saunders wrote Exhibit L-3 which is a report on the total acreage of the lands owned by the Estate of George R. Lordly and the proportion of that acreage within the City of Halifax and within the Municipality of the County of Halifax. Ms. Saunders regularly researches property ownership and land size, and maps property in the City of Halifax. She is a graduate of the Nova Scotia Land Survey Institute in Community Planning, and has completed a course in Natural Resources from Sir Sanford Fleming College and a property law course. Ms. Saunders was qualified as a mapping technician, qualified to determine the size and location of property for assessment purposes.

Ms. Saunders outlined the process by which she had arrived at her determination of the size and location of the subject property. The total size of the subject property was verified as 200 acres by reference to both the tax deed issued to George Lordly by the Municipality in 1967 and the description in the crown grant to Thomas Kirby made June 12, 1821. Thomas Kirby and the Estate of Thomas Kirby were the sole owners of the subject property prior to Mr. George Lordly.

At the time of the acquisition of the subject property by Mr. George Lordly, it lay entirely in the Municipality of the County of Halifax. A portion of the property was a part of lands annexed to the City of Halifax by order of the Board of

Commissioners of Public Utilities effective February 1, 1983. That portion of the subject property was added to the City assessment roll as of January 1, 1985, but the acreage was not initially calculated by the City's regional assessment office. Ms. Saunders was asked to do research on all of the annexed lands in January 1985.

The revised Halifax City boundary follows the boundaries of the original crown grants for most of its perimeter but a Nova Scotia Power Corporation transmission line easement marks the new City boundary south of Susie's Lake. Part of that easement cuts across the subject property. According to the Power Corporation the total acreage acquired from the Estate of George R. Lordly in 1978 was 24 acres. Ms. Saunders calculated that 11.5 acres of the easement lie in the City and 12.5 acres in the municipality.

Ms. Saunders mathematically calculated the total acreage of the subject property in the City of Halifax after establishing the revised city boundary in relation to the existing property lines on a 1:10,000 scale map. The total acreage of the subject property inside the Halifax City boundary is 141.1 acres leaving a balance within the Municipality of 58.9 acres (200-141.1).

On the subject of the existence and location of the old road referred to in the description in the tax deed conveying the subject property from the Estate of Thomas Kirby to George R. Lordly, Ms. Saunders said that the survey plan which accompanied the crown land grant (contained in Exhibit L-3) was the only depiction of the old road in relation to the subject property that she had found. Her contact with the Department of Transportation personnel responsible for research on land claims and rights-of-way showed that the right-of-way described as "the road leading from St. Margaret's Bay to Halifax" in the above tax deed had not been extinguished, and so could be considered a public travelled way which could be used by Mr. Lordly or others. Ms. Saunders acknowledged that if the right-of-way was used for the construction of a road it would need to conform to the current minimum width of 66 feet. Ms. Saunders attempted to plot the old road on the LRIS property map of Lakeside contained in Exhibit L-3.

Ms. Saunders filed copies of portions of two old maps obtained from the Department of Transportation. Both show the City of Halifax and the area to the west including the area where the subject property is located. Both Exhibit L-14, which dates from 1865, and Exhibit L-15, which dates from 1908, indicate by a dotted line what appears to be a road running from Geizer's Hill, northeast of the subject property, in a double curved line southwesterly. In the 1865 map exerpt the road appears to intersect with what is now Highway 3 to the west of Governor's Lake. The 1908 map shows the road turning south to intersect with "Highway 3" to the east of Governor's Lake.

Ms. Saunders scaled the LRIS map contained in Exhibit L-3 and concluded that the subject property was 1 kilometre distant from Highway 3 if measured from the southwest corner of the property westward and .5 kilometre if measured from the southeast corner of the property to the northwest corner of the Lakeside Industrial Park.

In cross-examination, Ms. Saunders agreed that she had not seen the road "on the ground" and that she had not plotted the old road because of time constraints on the search of all old crown grants.

Rodney Caiger, Senior Assessor with the Halifax City Assessment Region since 1984, was the author of Exhibit L-2, a report on the market value for assessment purposes of the subject property. Mr. Caiger has completed the 3 year course in Property Assessment through Henson College. He has a Forest Technician Diploma from Sir Sanford Fleming College and is working on the requirements for an AACI designation. The Board accepted Mr. Caiger as expert witness in matters of assessment.

Mr. Caiger's report determined the area of the subject property within the City of Halifax (141.1 acres) and within the Municipality (58.9 acres); the total value of the property ($126,900.00); the portion of that value in the City ($91,400.00) and in the municipality ($35,500.00); and the classification of the portion of the property within the City as Residential.

Mr. Caiger chose to use the Direct Sales Comparison approach in valuing the subject property as the most appropriate and reliable method for a 200 acre parcel of vacant land. To find comparable sales Mr. Caiger said he looked for records of sales of landlocked parcels in the area of the subject and eliminated in his search any lands with road frontage or sales which were not at arms length. The three sales which he chose to use as comparables have been previously described.

Sale #1, former Halifax City Watershed Lands purchased by the Halifax Industrial Commission from the Public Service Commission, are located within a few kilometres of the subject. Some of those lands have frontage on a limited access highway (Bicentennial Drive) while other blocks of these lands have frontage on Highway 3 and Highway 333. These former watershed lands are eight times larger than the subject property. Mr. Caiger examined appraiser's reports commissioned by both the vendor and purchaser, and considered that the final sale price of $2,373,300.00 for 1758 acres or $1,350.00 per acre was "if anything on the low side".

Mr. Caiger adjusted this sale price to compensate for road frontage, lake frontage and size on Sale #1 by an overall physical adjustment of 40%. The sale price per acre, $1,350.00, was adjusted for time to the effective valuation date of January 1, 1983, using a 5% per annum adjustment for time. This annual time adjustment figure was derived by Mr. Caiger from the nearby Spryfield area of Halifax where sales showed an average increase of 6.6% per year. He felt that this 6.6% figure should be reduced to 5% because bulk land values would not increase at the same rate as residential property values.

For Sale #1, the sale price per acre was adjusted for physical characteristics (-40%) and for time (-7.5%) gave a final adjusted price per acre of $748.00. Mr. Caiger considered Sale #1 to be a reasonable comparable when used with others because it was an arm's length sale of bulk land with waterfrontage in close proximity to the subject which took place only a year and a half later than the effective valuation date of January 1, 1983.

Sale #2, 210 acres in two parcels with frontage on Tomahawk Lake in the Pockwock watershed, purchased by the Public Service Commission from G. Royce Hefler on January 3, 1986, was used as a comparable by Mr. Caiger because these lands were landlocked, had been previously appraised, had lake frontage and were similar in size. Mr. Caiger felt that this sale was at arm's length. He adjusted the sale price of $600.00 per acre for time (-15%) and for location (+35%) because of the distance of the lands from any development. The adjusted sale price per acre was $688.50.

Sale #3, a 279 acre parcel with access to the Hammonds Plains Road near the intersection with the Lucasville Road was purchased by Northland Mobile Homes Limited from the Estate of Samuel Earl Haverstock for a sale price of $437.27 per acre. These lands have no road frontage but access the Hammonds Plains Road by a 66 foot right-of-way. Two Nova Scotia Power Commission easements cross the property. Mr. Caiger chose this parcel as a comparable because its sale took place close to the valuation date. He considered it to be inferior in location because the nearest residential development on the Hammonds Plains Road, Uplands Park, had experienced no growth "since the 60's" and he believed that there were fewer potential development possibilities in that area than in the Lakeside area. The deeded right-of-way he considered to be an asset not present for the subject property even though full ownership would need to be acquired before residential development could take place. These lands had no lake frontage, unlike the subject, and were subject to more power easements. Mr. Caiger considered that the increased value due to the deeded right-of-way was offset by the absence of lake frontage and the presence of an additional power line easement and so made no adjustment for physical characteristics.

For Sale #3, the sale price per acre of $437.27 was not adjusted for time since the transaction took place only two weeks before the valuation date, but was adjusted for location (+30%), giving a final adjusted sales price per acre of $568.45.

Mr. Caiger stated that he could find no other sales in the area which he considered to be comparable and knew of no other subsequent sales since his report had been prepared. When he was valuing the subject property he was not aware of a road to the subject property. To familiarize himself with the property Mr. Caiger had used ortho photos, contacted the Department of Lands and Forests for more recent information, and examined colour aerial photos which revealed the road from the Industrial Park to the Power Commission right-of-way. Mr. Caiger walked the subject property using this road for access but found no other road access.

In calculating the value of the Power Corporation easement on the subject property, Mr. Caiger checked with the Nova Scotia Power Corporation and their appraisal of the adjacent Boylan lands, which disclosed that the Corporation had paid 50% of the value of the land to purchase the easements. Mr. Caiger believed that 50% was a standard discount for easements in Halifax City.

On the matter of the classification of the subject property as residential, Mr. Caiger stated that of the three available choices - resource, commercial or residential, he eliminated the resource classification because he considered that it was neither agricultural land nor forest property. He said that the property has trees on it and is woodland but that there was no indication that it was being managed for bone fide forestry purposes or that silvaculture was being practiced. He did not consider that it was commercial property and chose to classify it as residential because its zoning is Holding (H) Zone which restricts the uses of the land to single-family residential, parks or playgrounds, recreation centres, or a professional office in a residence. The tax rate in the City of Halifax for properties classified residential or resource is the same.

Mr. Caiger disagreed with a number of statements contained in the letter from Mr. Holden, Chief Engineer with CBCL Limited, to the Appellant's Solicitor (Exhibit L-6). He disagreed that the subject property was "landlocked" and did not agree that the owner would need to obtain easments or rights of way to gain access to the property. He disagreed that access was needed to the centre of the property, believing that access to the edge of the property would be sufficient. Finally he stated that a completely new road was unnecessary because a "minimal" road existed from the industrial park to the subject which needed upgrading only and was shorter than that proposed by Mr. Holden.

Mr. Caiger disagreed that the estimate of value of the subject property contained in the letter from T.J. Davis of United Trust Company dated January 21, 1975 (Exhibit L-10) had any validity as an opinion of value because of the time lapse and because there was no support for how that value had been achieved.

Mr. Caiger disagreed with many of the statements in the letter from Ms. Meschino to the Appellant dated August 20, 1986 (Exhibit L-13). He did not think that the property was "totally inaccessible" or that it was "3 miles inland from the Lakeside Industrial Park". He also disagreed with her revised estimate of 1.5 kilometres given in evidence. The three (intervening) properties mentioned were all in one ownership he said and a deeded right-of-way was not required for access. He disagreed that the best use of the property was woodland and felt instead that the property had potential for residential development. He disagreed that either $50.00 per acre or $250.00 per acre were correct estimates of value because of inadequate research done to establish that value, and because neither figure, in his opinion, took account of the positive factors of a location near an industrial park and in proximity to residential development.

In cross-examination, Mr. Caiger stated that the lands comprising Sale #1 were zoned "Watershed" at the time of purchase and subsequently zoned Industrial. Sale #1 was valued as vacant land, Sale #2 was valued as recreation land. With regard to Sale #3, Mr. Caiger agreed that there was "spotted residential development along the Hammonds Plains Road" but he contended that there was more development along the St. Margaret's Bay Road and since that area has municipal sewer and water services, it is more attractive.

Concerning the subject property, Mr. Caiger agreed that the proximity of the railway location would benefit a future industrial use but would have no advantage to residential development of the subject. Mr. Caiger denied that the power easement injuriously affected the subject property and suggested that other subdivisions in the area have accommodated such easements in the design of their development.

Mr. Caiger confirmed that he had valued the subject property as vacant, inaccessible bulk land. He had not used the Cost of Development approach because he did not think it appropriate. This approach to value "creates" a hypothetical subdivision, projecting value for hypothetical lots and sale prices for the lots; after deducting costs to develop, the remaining amount represents the value of the property. This approach to value is used for lands ready for development and presently in demand, which Mr. Caiger felt was not the situation of the subject property.

Mr. Caiger stated that the assessments of all the lands in the area annexed by the City were appealed by the city, their assessments reviewed, different account numbers set up and acreage searched. All these properties subsequently changed in assessed value.

Owen Holland, Assistant Director of Assessment in the Halifax County Region for the past five years and an assessor for seventeen years, gave evidence on the assessment of the subject property while it was in the Municipality of the County of Halifax, and the assessment of that portion of the subject remaining in the Municipality after annexation.

Mr. Holland verified the assessment information on the subject property set out in Exhibit L-7, taken from the field records of the Halifax County Assessment Region. Exhibit L-7 shows that the subject property was re-assessed in 1981 at $100.00 per acre for a total assessed value of $20,000.00 ($100.00 x 200 acres). At the next re-assessment in 1984 the subject was valued at $125.00 per acre for a total value of $25,000.00 ($125.00 x 200 acres).

The boundary changes resulting from annexation did not have an effect on the assessment of the subject property until the following year. In 1985 the property in the Municipality was reduced to 105 acres which resulted in an assessed value of $10,500.00 because the figure of $100.00 per acre was used in error instead of the value of $125.00 per acre established in 1984, according to Mr. Holland.

Mr. Holland stated that he had read the reports by Ms. Saunders and Mr. Caiger and agreed with the acreage calculations made by Ms. Saunders and the assessed value determined by Mr. Caiger.

In cross-examination, Mr. Holland explained the policy of the Halifax County Assessment region in the valuation of "backlands" or landlocked parcels of land judged not to be subject to the market influences of roadways and subdivisions. The value of such lands was established originally by consultation with such government agencies as the Department of Lands and Forests, the Farm Loan Board, etc., and these values were subsequently "arbitrarily" indexed up as the level of assessment increased over the years. According to Mr. Holland it was considered that there was so little market for these types of properties that no effort was made to assess them in relation to market value. He allowed that he had some problems with the accuracy of that method but agreed that it was still in use in the Halifax County Region.

Counsel for the Appellant and the Director filed post-hearing briefs. Counsel for the Appellant states in his brief that the only issue before the Board is "whether the assessed value placed on the subject property by the City in 1985 and 1986 is too high." Counsel for the Director in her brief suggests that the issues before the Baord are the correct amount of land in the subject property to be assessed in the City of Halifax for the 1985 and 1986 assessment years, the correct value of that land for the 1985 and 1986 assessment years, and the correct classification of the land located in the City of Halifax which is the subject of this appeal for the 1985 and 1986 assessment years.

Although the grounds of appeal set out in the Appellant's Notice of Appeal cite "incorrect findings of fact including but not limited to, the size of the assessed property" and "incorrect or inappropriate classification of the assessed property", the post hearing submission on behalf of the Appellant withdraws the issues of both size and classification of the property as grounds of appeal. On the matter of size of the property Counsel for the Appellant states:

> " The aforementioned findings of the Mapping Technician (the acreage lying respectively in the City and in the Municipality) are not disputed by Mr. Lordly."

On the matter of the classification of the property, he states:

> " It is respectfully submitted that the classification of the subject property is not at issue in this proceeding."

The duties and powers of the Board on appeal are set out in Section 101 of the Assessment Act as follows:

> " 101(1) The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter."
>
> (2) On the appeal the Board shall have all the powers of the regional assessment appeal court."

The powers of the regional assessment appeal court are set out in Section 89(1) of the Act as follows:

> "Section 89(1)
>
> On any appeal, the court may:
>
> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed;
>
> (aa) dismiss the appeal;
>
> (b) add to the roll the name and assessment of any person left off the roll;
>
> (c) strike off the roll the name of any person wrongfully entered thereon;
>
> (d) transfer the assessment to the proper person when any property has been assessed in the name of a person who is not legally liable to be assessed therefore;
>
> (e) when any property has been assessed more than once, strike out the assessment that is improper or illegal;
>
> (f) change the classification of all or part of the property that is the subject of the appeal; and
>
> (g) correct any clerical errors made by the assessor in the assessment roll."

The evidence before the Board indicates that the portion of the subject property within the City of Halifax is 141.1 acres in size. The parties agree with this conclusion which results from extensive research and detailed calculations by Mapping Technician Nancy Saunders. Of that total 141.1 acres under appeal, 11.5 acres are subject to a Nova Scotia Power Corporation easement.

The assessor used the direct sales comparison approach to value the subject property, the most appropriate to the subject of the three general approaches to value generally used. The three comparable sales of property chosen by the assessor were analyzed in detail and adjusted where necessary to allow for differences between the comparables and the subject. The resulting adjusted sales prices ranged from $568.00 per acre to $748.00 per acre. The assessor chose to use a value close to that of the comparable most similar to the subject ($688.00 per acre) and determined that the value of the subject property should be $675.00 per acre for that portion not subject to an easement and $337.50 for lands subject to the Nova Scotia Power Corporation easement, as follows:

129.6 acres x $675/acre =	87,480	
11.5 acres x $337.50/acre =	3,881	
total	$91,361	(rounded to $91,400.00)

The Appellant submitted no comparable sales in evidence. Counsel for the Appellant argued that the comparables relied on by the assessor were not adequate to determine the value of the subject property or if used should be adjusted to compensate more adequately for the differences with the subject. He argued as well that two of the three comparables used by the assessor involved government bodies as purchasers which "may spend more to purchase property for specific uses (i.e., watershed lands or industrial developments) which [are deemed] to be in the long range public interest". Finally, Counsel for the Appellant argued that "a realistic value for the subject property" would be the valuation of $250.00 per acre made by the firm of

Kempton, Smith and Associates Limited for the Nova Scotia Power Corporation on March 3, 1978, previously referred to in this decision, and agreed to by Ms. Meschino in her testimony. Counsel for the Appellant adds that "some inflationary factor may be applicable over the eight intervening years since the former appraisal to allow a moderate increase in this figure."

The Board accepts the assessor's opinion of value of the subject property. While Counsel for the Appellant raised questions about the validity of the adjustment made by the assessor to the comparables used to establish a range of market values for properties similar to the subject, no alternative adjustments were presented. The assessor acknowledged that sales of vacant, landlocked, bulk land in the general vicinity of the subject were difficult to find and agreed that adjustments for physical characteristics and location are essentially subjective. The Board prefers the analysis and conclusions of the assessor in the determination of the market value of the subject property to that of an 8 year old professional appraisal of the property or the evidence of a real estate agent with two years' experience and no expert status in the field of property appraisal.

On the matter of the classification of the subject property the Board cannot agree with the assessor who classified the portion of these lands in the City as Residential. (The portion of the subject property in the Municipality of the County of Halifax was classified Resource-General).

The sections of the Act relevant to the classification of property are the following:

> "Section 25(1) All assessments shall be designated as being residential property, commercial property or resource property, or partly one and partly another."
>
> "Section 1(naa) "residential property" means property or part thereof used or intended to be used for residential purposes, but does not include the portion of a hotel or motel used for the purpose of lodging for the public;"
>
> "Section 1(ca) "commercial property" means all property or part thereof except residential property and resource property, and includes the forest property owned by a person who owns fifty thousand acres or more of forest property in the Province;"
>
> "Section 1(nb) "resource property" means:
>
> (i) farm property;
>
> (ii) forest property owned by a person who owns less than fifty thousand acres of forest property in the Province;
>
> (iii) land of a municipal water utility, excluding any building or structure thereon;
>
> (iv) community fishermen's service buildings, occupied and used by boat owners who are licensed commercial fishermen, and the land used in connection therewith;
>
> "Section 1(ea) "farm property" means the land and complementary buildings used for agricultural purposes but does not include any residential property and the land used in connection therewith;"
>
> "Section 1 (eb) "forest property" means any lot of land, excluding any buildings or structures thereon, not used or intended to be used for residential or commercial or industrial purposes or any combination of such purposes;
>
> "Section 1(fa) "intended to be used" means a present intent supported by some substantial act to carry out the intent;"

Counsel for the Director agrees that the subject property is not presently used for residential purposes. The restrictive zoning placed upon it by the City limits its use as-of-right to residential uses primarily. The assessor considered that the restrictive rezoning of the property constituted a "substantial act" supporting "a present intent" (on the part of the City) that the property be used for residential purposes. Counsel contends: "The Assessment Act does not limit the "substantial act" evidencing a "present intent" that property will be used for a specified purpose to the intention of the owner of the property".

The Board agrees that Section 1(fa) which defines the phrase "intended to be used" does not exclude the possibility that the "substantial act" supporting a "present intent" could be a rezoning decision of the municipal unit in which the property is located. The Board's conclusion from a reading of Section 1(fa) is that the section is silent about whose "substantial act" should be judged to support a "present intent". If the classification of property can be determined by its zoning rather than by its current use, how would the balance of the subject property be classified, given its zoning by the Municipality as MR-1 (Mixed Resource) Zone? The MR-1 Zone allows, as-of-right, the following uses:

> "Residential uses: Single unit dwellings, mobile dwellings erected on permanent foundations, two unit dwellings.
>
> Resource uses: Agricultural uses; forestry uses; kennels.
>
> Industrial uses: any I-1 Zone use permitted; and I-4 zone use permitted; salvage yards.
>
> Community uses: open space uses."

It would seem to the Board that determining a classification for the subject property by the use intended by the zoning would be very difficult in such a mixed use zone as the MR-1 Zone.

The Board heard no evidence that the appellant intended to use the subject property for residential, commercial or industrial purposes - or in fact for any other purpose than that for which it is currently being used which is as forest property. In the opinion of the Board, when the current use of the property is clear and no other intent on the part of the owner is proven, the classification of the property should reflect its use. A future use of the property after all will be determined as much by the owner as by the land use policies and by-laws of the municipal unit. The owner may not necessarily use the property for residential purposes just because the zoning restricts it primarily to that use. The owner may contest the city's intended use for the property by applying to have it rezoned to allow a different use, and may be successful in having it rezoned.

Resource may be an unusual classification of property in the City of Halifax but it appears to be the most appropriate for the subject property.

Counsel for the Director argues that the Board has the jurisdiction, under Section 91(1)(b) of the Act, to increase the assessment of that portion of the subject property not appealed because the Board has all the powers of the Regional Assessment Appeal Court. Section 91 states:

> "Section 91(1) The court may, of its own motion,
>
> (a) add to the roll any property that has been omitted therefrom with the value thereof as determined by it and the name of the person to whom it should be assessed; and
>
> (b) increase the amount of the valuation of any property."

The Board declines to do so, having heard evidence on the market value of only two landlocked vacant parcels of bulk land within the municipality.

In conclusion, the Board determines that the assessment for the 1985 and 1986 assessment years of the 141.1 acre portion of the subject property within the City of Halifax shall be $91,400.00 based on the assessor's opinion of value, and that its classification shall be Resource. No costs will be awarded.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of April, A.D., 1987.

EASalton

ELIZABETH SALTON
Vice-Chairman

Morgan v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--VACANT LOTS--COMPARABLE SALES--PURCHASE PRICE--APPELLANTS' EVIDENCE OF RECENT SALES HEARSAY--ASSESSOR'S EVIDENCE ENTITLED TO LITTLE WEIGHT--ASSESSMENT ACT, SS. 1, 1(A), 38(1), 101(1)--MUNICIPAL BOARD ACT, S. 16(1)

This is an appeal by D.C.I.M. and B. J.M., his sister, from a decision of the Cumberland Regional Assessment Appeal Court confirming a single residential assessment of three vacant lots of $6,000. The Appellants did not appear at the Regional Assessment Appeal Court in support of their appeal. Each lot is approx. 100 ft. x 300 ft., fronts on the Malagash South Shore Road (a paved highway) and is separated from the ocean front by a subdivision right-of-way and another tier of lots. Several rights-of-way permit access from the subject lots (the back lots) to the sea. Secondary evidence by the Appellants concerning recent sales was objected to on the basis that the evidence was hearsay and D.C.I.M. was not an expert entitled to give opinion evidence. The Board agreed. The Appellants' position was that the market for the back lots was weak as the likely purchasers were only those already owning front lots.

HELD: The appeal is allowed and the market value for assessment purposes set at $1,500 per lot, for a total of $4,500.00. No costs are awarded to any party.

Although the Appellants did not appear on their appeal to the Regional Assessment Appeal Court and the maximum tax reduction sought is $20-$30 per year, the Board has a duty to resolve this appeal based on the evidence before it and to make a full and due inquiry de novo (s.101(1) Assessment Act). D.C.I.M. is a credible witness with a deep, detailed knowledge of the area, and where there is a dispute of fact between D.C.I.M. and the Assessor, the Board prefers the evidence of D.C.I.M. The Board also notes that the Assessor, regardless of all the assessment courses he has taken and the practical assessment experience he has gained, has very little concept of the underlying principles under which he must assess properties. The Board is uncertain that the Assessor is qualified to give accurate opinion evidence, and, at the least, doubts that his opinion as to value given in this case is of sufficient degree of accuracy (both as to legal principles and the factual context) to be entitled to much weight by the Board. The Board does accept those portions of his evidence advocated by both parties. The best evidence the Board has as to value is the price the Appellants paid in 1980; D.C.I.M. argues prices have held stable or gone down. The Board determines that the amount paid in 1980, i.e. $1,500 per lot, is the market value in Jan. 1986. There is no reliable evidence before the Board as to the true level of assessment in the region, but the Board, noting that determining this accurately here will make very little difference to any party, sets the assessed value of the three lots at $4,500. Because the Appellants should have tried their appeal first on its merits at the Regional Assessment Appeal Court and in view of the hesitancy of the Board to rely on the report tendered by the Director, there will be no costs for any person.

NSMB-151-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967 Chapter 14;

- and -

IN THE MATTER OF: An appeal by Brenda J. Morgan and David C.I. Morgan from a decision of the Regional Assessment Appeal Court, dated June 17, 1987 which confirmed the 1987 assessment of Lots 8, 9 & 10 at Malagash Point, County of Cumberland, Province of Nova Scotia.

BEFORE: RICHARD L. WELDON, Member

COUNSEL: DAVID I. MORGAN, representing the Appellants David C.I. Morgan and Brenda J. Morgan;

RANDALL R. DUPLAK, LL.B., for the Director of Assessment

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, Municipal Board Act, the Chairman assigned Board Member, Richard L. Weldon to hear this assessment appeal at the Board's October 21, 1987, sittings at the Council Chambers of the Municipality of the County of Cumberland, Upper Nappan, Nova Scotia.

This is an appeal by DAVID C.I. MORGAN and BRENDA J. MORGAN, his sister, from a decision of the Regional Assessment Appeal Court, Cumberland Region, dated June 17, 1987 whereby that court refused the appeal before it of David C. Morgan and Brenda Morgan (the present Appellants) in the following words " ex parte - Appeal dismissed - assessment confirmed". This decision concerned the assessment of David C.I. Morgan and Brenda J. Morgan of certain properties situate at Malagash Point in the

County of Cumberland, being Lots 8, 9 and 10 of a Subdivision entitled "Lands of Sunrise Shores Realty Limited and Charles Farrow". The assessment under appeal to the Regional Assessment Appeal Court and to this Board was a single residential assessment of $6,000.00 comprising three vacant lots. The Notice of Appeal was dated July 6, 1987 and it was received by the Clerk of the Nova Scotia Municipal Board on July 9, 1987. The Notice of Appeal alleged that the decision of the Regional Assessment Appeal Court was received by the Appellants on July 3, 1987. This Notice of Appeal is before the Board as Exhibit M-1. The Notice of Appeal is in somewhat greater detail than the Board usually receives and the Board extracts from that Notice of Appeal some of the grounds of appeal:

> (a) poor land ("back" lots) with respect to near marsh location, health unit considerations, a lack of public demand, and
>
> (b) a historical asking price of $2,000 per lot with a similar historical selling price of between $1,333 ot $1,500 per lot;
>
> consequently, the assessment of $6,000 ($2,000 per lot) must be considered (over the actual cash value of the lots and thus excessive. Based upon the most recent data, the actual cash value should not be assessed over $4,000 for the three lots 8, 9 and 10. Even historically the maximum possible assessment would be $4,333 (total-averaged), although this is high when demand, location and quality are considered."

The Notice of Appeal was signed on behalf of and for Brenda J. Morgan and David C.I. Morgan by their father, David I. Morgan, who conducted the appeal before the Board.

The appeal was heard on October 2, 1987, at the Council

Chambers of the Municipality of the County of Cumberland, Upper Nappan pursuant to the Notice of Hearing. Counsel for the Respondent filed an estimate of valuation prepared by an assessor concerning the subject property.

The hearing commenced October 1, 1987 at 10:00 A.M. and ended at 2:30 P.M.

The subject property consists of three lots in Malagash Point, Cumberland County and has paved road frontage on the Malagash South Shore Road. Each lot is approximately 100 x 300 feet and each therefore contains about 30,000 square feet. The lots, in total, encompass 90,000 square feet. They have 300 gross foot frontage on the Malagash South Shore Road, a paved highway. The other end of the lots front on a 66 foot right-of-way shown on the Subdivision Plan which is a portion of Exhibit M-3 (the Valuation) on a part thereof marked " Page 15". The subdivision itself consists of two tiers of lots. One tier (consisting of lots 1 - 13 inclusive) butts on the Malagash South Shore Road. To the south of this tier is a subdivision right-of-way and south of that again against the seashore are a second tier of lots (14 - 26 inclusive). The first tier of lots were called in evidence (and will be called in this decision) "back lots" and the other tier of lots, Lots 14 - 26, will be called the "shore front lots". The subject lots are vacant land and back lots. In 1974 (at subdivision time) it is the understanding of the Board that all the lots in this subdivision were then vacant.

The Respondent raised a preliminary objection or notation that the Director required strict proof of the agency of the person appearing to represent the assessed owners and also of the strict proof of the service on all parties concerned and this was provided to the satisfaction of the Board whereupon the Board dismissed the preliminary notations and objections of the Respondent.

The Appellant proved appropriate service of the Notice of Appeal and of the Notice of Hearing. The Board is satisfied that the Appellant has properly carried out all the procedural requirements under the Assessment Act, R.S.N.S. 1967, Chapter 14. The Board therefore assumed jurisdiction to hear the appeal on the merits.

Mr. David I. Morgan, for the Appellants, gave evidence for the Appellants and also made argument not always strictly differentiating between the two. The Director called one witness, Senior Assessor, Mr. Robert A. Hoeg. Both parties made argument.

Many of the facts in this appeal are not in dispute. The appeal first must be shown to be of little economic import to the Director since it essentially dealt with the $6,000 assessment and a 1987 tax rate of $.82 which translates into less than $60.00 gross taxes for a year and the Director had not bothered to appeal that $6,000.00 assessment although he has now come in WITH evidence attempting to support a market value of the land of $7,100.00. On the other hand, the Appellants concede as a minimum that the property has a maximum value of some $4,000.00. The maximum assessment reduction they could expect would be roughly one-third of the actual assessment. The maximum tax reduction sought would be thus $20.00 - $30.00 per year. This strikes the Board as a type of an appeal that a dissatisfied taxpayer ought better and properly to make before the Regional Assessment Appeal Court.

It will again be noted on the record at this time that the decision of the Regional Assessment Appeal Court was made ex parte because nobody appeared there in support of the Appellants' appeal. Mr. Morgan, on behalf of the Appellants, explained that he had some misapprehension and felt the documents he filed would be adequate to conduct the appeal in the Regional Assessment Appeal Court. This may be an explanation why the Regional Assessment Appeal Court proceeded ex parte but a person who prepared his appeal for that Court as carefully as he did for this Board could have made himself aware of the remedies available and the process necessary in order to have his appeal heard at that time and place.

In any event, there is a decision of the Regional Assessment Appeal Court and this appeal is within time and this Board has a duty to resolve the appeal before it based on the evidence before it and to make a full and due inquiry of the appeal de novo, pursuant to Section 101(1) of the Assessment Act which reads as follows:

> "101(1) The Nova Scotia Municipal Board shall inquire into the matter de novo, and

> shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter."

The Appellant has a great deal of knowledge of this particular subdivision as he had purchased some of the seashore lots which were opposite the subject lots and upon which he had located his own recreational residential dwelling. In this subdivision it was the common position of both the assessor and Mr. Morgan for the Appellants that the rights-of-way as shown on the subdivision plan basically gave access to the centre right-of-way of the subdivision so that all lots abutted on that centre right-of-way and had access to the Malagash South Shore Road. More importantly, from the standpoint of using all recreational areas, the four or five rights-of-way that ran from the centre line right-of-way to the sea were accessible and for the use of all lots within the subdivision 1 - 26 inclusive (each lot owner in the subdivision would have access both to the road and to the sea through the various rights-of-way). The rights-of-way to the sea from the centre line of the sea varied in width from 20 feet to 8 feet to 12 feet and whereas the major centre right-of-way was 66 feet wide.

Mr. Morgan testified that most people in this subdivision had purchased shore front lots and had purchased some of the back lots as additional property. He testified that he had purchased the subject lands for his son and daughter and in their names when he found that the subdivider was cutting trees on the back lots behind his shore front lots and he was thus losing the cover and protection for his sea shore lots that those back lots had heretofore provided. He said his seashore lots would tend to lose their recreational value to him if the trees on the adjacent back lots were cut. He purchased the subject lands on behalf of the son and daughter Appellants for the purchase price of $4,500.00 in 1980.

Mr. Morgan attempted to give evidence concerning recent sales inside the subdivision with indirect evidence. This was objected to by Mr. Duplak on behalf of the Director on the grounds that it was hearsay, that witnesses, purchasers and sellers were available and that Mr. Morgan had not proven himself to be the type of expert entitled to give opinion evidence, as an expert, and to use and to evaluate secondary evidence in such a manner to ensure that it be brought before the Board in a reliable fashion. With a great deal of regret, the Board had to agree that Mr. Duplak was quite correct and the Board excluded the secondary evidence objected to by Mr. Duplak of various sales in the subdivision.

Mr. Hoeg, the Senior Assessor who had prepared the report was qualified as an expert entitled to give opinion evidence. Mr. Hoeg did bring in evidence of four sales which are shown outlined in the plan of subdivision before referred to. Sale #1 consisted of lots 15 and 16, shore front lots; Sale #2 consisted of lots 13 and 12 which are the back lots; Sale #3 was lots 5, 6 and 7 and Sale #4 was of lots 25 and 26. (It turned out by the conclusion of the Hearing that Sales 2 and 4 were actually one combined sale).

The Appellants' position was simple and went as follows. Persons who bought land in this subdivision primarily bought and wanted seashore lots. They ordinarily bought the back lots for protection of the recreational qualities of their recreational seafront property. Once all the subdivision lots had been sold and each person had a piece of land suitable for his wants outside purchasers would not find the rear lots individually desirable. Thus the only possible market for individual rear lots was for internal purchases by persons already owning lots in the subdivision (every cottage owner having purchased all the land he needed when it was available, there was no real desire on the part of the present owners to purchase additional individual rear lots). The Appellants' position was that the market for these back lots was all internal and it was weak.

The position expressed by Mr. Hoeg and which the Board will deal with later in some detail was that over a period of time the land prices are generally rising in the area, but that he would not state an annual percentage of the rate of increase. He agreed in principle that the sea shore lots and the back lots had a very different market value but he wouldn't speculate as to the ratio that one bore to the other.

Mr. Hoeg's testimony indicated he was not personally familiar with the recreational boating uses, swimming uses, etc., put to the sea front by the owners of the shore front lots or indeed by any persons who lived in the subdivision. Mr. Morgan's testimony as to the use and utility of the seafront of the subdivision from a point opposite the front of Lot 18 and from thence west showed there was a good sandy beach but that the best sandy beach in the area was further west of the western boundary of the subdivision. Mr. Morgan also testified that between Lot 18 to 22 inclusive, the seafront was very rocky and a relatively useless and then from Lot 22 to 26 there was a mixed rock and sand on the beach which was somewhat better than the centre portion of the sea front of the subdivision but somewhat worse than the western portion of the subdivision seafront. All in all, Mr. Morgan seemed to be quite knowledgeable as to the sea frontage of this subdivision both as to its physical configuration and to the use to which it was put by the owners of the lots in the subdivision.

Mr. Hoeg said that he gave no consideration to the 1980 sale of the lots in question to the Appellants at $4,500.00 (except to say that that sale price would set a floor price for the subject land) since it was his opinion that the values set by that sale would be too remote in time (6 years old) and they would be too low to help in setting a January 1986 market value.

Mr. Morgan for the Appellants does not rely on Sale #1 as described in Mr. Hoeg's report, Exhibit M-3. He relies on Sale #3 which was a sale of three back lots adjacent to the subject land in September 12, 1986 for $1,333.33 per lot. Failing that as a comparable, Mr. Morgan relies on a sales price figure less than his own purchase price of the subject lands in 1980 at about $1,500.00 per lot. The Board mentions these comparisons because all sales comparisons were testified to in one way or another by both parties. Nobody went outside the subdivision for comparables. Since the subdivision had been totally sold sales information concerning other sales could have been available for further comparables. This seemed to be an appropriate process of getting good comparables.

The Board shall then deal with this appeal in the context of Mr. Hoeg's report. Its decision is basically a critique of that report in light of all the evidence delivered before the Board.

Mr. Hoeg dealt with Sale #1 which showed a sale in June 1985 at a sale price of $9,400.00 (two lots at $4,700.00 per lot). He conceded that these lots were superior to the subject lots in that they had water frontage. The subject lands do not. This was a separate sale of two shore front lots together with no accompanying sale of back lots.

According to Mr. Hoeg, Sale #2 is the sale of two back lots at $3,000.00 per lot ($6,000.00) in October 23, 1985. He said the Sale #2 lots were very close to the subject lots and were apparently the same type of lots as the subject lots. He found the Sale #2 lots to be the ones which were to him the proper comparables which set the market value of the subject lots, with some value adjustment to a lower price.

Sale #3 was a sale price of three lots. Some of the lots were partially cleared. He discounted Sale #3 as being the completion of an old total sale consisting of back lots 3 and 4, finally sold, and back lots 5, 6 and 7 presently sold, as the two parts of a single transaction that had been made over a long period of time pursuant to what he believed to be a "gentlemen's agreement" His evidence as to this transaction was all of a secondary nature. Mr. Morgan protested Mr. Hoeg's explanation of Sale #3 at least in argument, if not in admissable evidence. According to Mr. Hoeg, Sale #4 as of two lots in the front at $4,500.00. He said these were water frontage lots and they were subject to extra value and of not much use as comparables to the subject lots.

Mr. Hoeg said because of the close proximity in time to the January 1st, 1986 evaluation date, he made no time adjustments in the values of his comparables. He is said in his summary "the 4 sales took place within 9 months of the effective date of the appraisal. No adjustment for the time has been made."

The Board sets out pertinent parts of Mr. Hoeg's conclusion:

> "Sale No. 1 and Sale No. 4 are Water Front lots and the sale price shows they have a value around $4,600.00 per lot.
>
> Sale No. 3 is a comparable sale but the package deal involved between Mr. Farrow and Mr. Houston has resulted in a low sale price of $1,33.33 per lot. I feel this value has to be considered low and not an arms-length transaction.
>
> Sale No. 2 is a comparable sale, lots have

> the same topography and growth as the subject. Sale No. 2 is 30,000 sq.ft. smaller than the subject and sold for $3,000.00 per lot.
>
> I feel if there had been three (3) lots the sale price would have been less.
>
> Having considered all factors in this report, it is my opinion that Market Value of lots 8, 9 and 10 would be $2,600.00 per lot or $7,800.00.
>
> The Level of Assessment in the Municipality of Cumberland for the year 1987 is 91.95%
>
> The Assessment of the subject property for 1987 would be $7,800.00 (estimated market value) x 91.95% (level of assessment) = $7,172.00 or $7,100.00."

Mr. Morgan had gone to a considerable amount of trouble explaining the topography of the subject subdivision, the surrounding sea front and surrounding marshes and marsh land. He adduced several aerial photographs with diagrams drawn on them by him which graphically showed for the Board the points that Mr. Morgan making. In all questions of fact concerning the topography of the land, the Board finds that Mr. Morgan to be a credible witness and if there is a dispute between his evidence and the evidence of Mr. Hoeg, the Board prefers that of Mr. Morgan on the grounds that it is clear from Mr. Morgan's evidence that he made a careful study of the surrounding area and had a deep knowledge of the area and that the Board has the impression that Mr. Hoeg's knowledge of the area is much less detailed. Mr. Hoeg demonstrated to the Board's satisfaction, that he did not have a detailed knowledge of the interior condition of the subject lots and that he did not have a detailed knowledge of the user of the seafront, which to the mind of the Board, would have a very strong impact of the valuation of recreational land on a shore front such as found here in the subdivision in question.

In argument, Mr. Morgan expressed the opinion (which no evidence supporting such detailed mathematics concerning the ratio of sale prices of shore front lots and backlots) that the purchase price of the shore front lots is three or four times higher than the purchase price of the back lots, i.e., that the value of the seafront lots is three or four times as great as the value of the rear lots. It is apparent to the Board from all the evidence that there was some problems in having building permit approval of the 26 lots as some of them would, and some would not pass soil percolation tests. The land in the subdivision, relatively speaking, is quite flat and quite low although higher than the marshes in the immediately surrounding area. The most valuable packages (and the way that many of the lots were sold) of land in this subdivision, were sold with one or more back lots combined with one or more shore front lots. People preferred to put their summer dwellings on the shore front lots and to use the back lots for their own recreation, firewood and buffering purposes.

In essence, when it comes to valuation, the Appellants rely primarily on Sale #3 and say "Here's a very recent sale, at $1,333.00 per lot of very comparable lands (in fact adjacent lands"). Mr. Hoeg contests this on the grounds that some other back lots, maybe 2, 3 and 4 had been previously purchased under the same gentlemen's agreement and that there had been a "mortgage"ensuring the completion of the transaction. The Board tends to accept this explanation although it is second hand because it is unable to hear in evidence the contrary evidence (again second hand) that Mr. Morgan attempted to adduce. The type of transaction, as described by Mr. Hoeg, the Board is aware, is reasonable and is of a type often used in rural recreational residential development. You will note that this particular total package (if it was a total package and the Board finds that to a balance of probabilities that it was) if it was a total package then the total package consisted of all back lands and no seafront according to the evidence before the Board. The Board is firmly of the opinion on the evidence adduced that the most valuable package of land in this subdivision would be the combination of shore front and back lots as opposed to a group of back lots only. So the Board is able to say that Sale #3 at $1,333.00 a lot is low value per lot because it does not make a combination with any shore front lots.

Mr. Hoeg's strongly represented that the sale of 13 and 12 at $3,000.00 a lot [his Sale #2] (less a small discount because they weren't bought in the same quantity as the subject lots) showed these lots were slightly more expensive than the subject lot. This is his strongest point. Sale #2 is the comparable on which Mr. Hoeg rests his valuation of the subject lots. His choice here of the proper comparable must be discounted because in fact his presentation was incorrect in that Sales 2 and 4 were made in combination at one time for a gross purchase price of $15,000.00 with no breakdown made in that price between shore front and back lots. Again, the people who made these transactions either vendor or purchaser were not brought before the Board either by the Appellants or the Respondent. The Board was left with a secondary information which the Board finds too imprecise to be usable to support the value opinions made therefrom by Mr. Hoeg.

In this case we have a documentary secondary source of information as to Sales Nos. 2 and 4. The Board refers to Exhibit M-12 which is a reply made by the Sales 2 and 4 purchaser, at departmental request, in which the Board will set out the items that it considers relevant.

> "Former Owner: Malcolm & Joy M. Russ
> Present Owner: John & Nellie VanderMeer
> Date of Deed: Oct. 23, 1985....
> Purchase Price: $15,000 for the block of 4 lots
> ($4,500 - $5,000 for lots with ocean frontage;
> $2,500 - $3,000 for the "back" lots)
>
> Comments or unusual circumstances which may have affected purchase price:
>
> Individual prices for the lots were not discussed; Purchase price may have been influenced upward by our "Halifax" concept of property values.
>
> (Signature) John VanderMeer"

This request for information is on an official form of the Department and was made in order to obtain information to Mr. Hoeg's report. Mr. Hoeg tried to explain his errors in not combining Sale No. 4 and Sale No. 2 by saying he relied on a telephone conversation that he had with Mr. VanderMeer. He said that M-12 was only received on October 19, 1987 by his Department. This so-called VanderMeer "sales request" strikes me as a more detailed answer and shows clearly how the transaction appeared at least in the purchaser's mind. Mr. VanderMeer was unable to apportion percentages of value between his shore front lots and back lots although he reasoned it was 2/3 - 1/3 ratio but Mr. Vandermeer clearly admits that he didn't contemplate the difference in per lot terms. He wanted the package of lots and he regarded his purchase price as a unitary purchase. The fact that he has a Halifax tendency merely shows that there's a provincial market for the land in this subdivision and therefore this is not a no-development area.

Sale #1 was discounted by both parties on the grounds that it was seashore lot. According to Mr. Morgan those seashore lots, 16 and 17 were on the best area of the subdivision's beach. According to the evidence adduced, the Board is certain that there were no back lots sold in combination with these seashore lots. No one disputed the purchase price in June 1987 amounting to $4,7700.00 per lot for Sale #1. The Board concurs in the view of both parties that Sale #1 is not the comparable most relevant to the valuation of the subject property.

On his qualifications as tendered to the Board, Mr. Hoeg, based on the training he received after High School and particularly the experience he would have had as an assessor of one kind or another in this area from June 1974 until the present time, should have qualified him to not only to give opinion evidence, which he has done, but to give reliable opinion evidence which would be entitled to extreme weight in this particular dispute, especially when not confronted by contrary opinion evidence by an expert qualified in land assessment and land evaluation methods.

Under his cross-examination by Mr. Morgan, many factual discrepancies and factual lacunae were demonstrated as to his views of the site, so to which properties were which, as to the condition of the seashore all of which to the mind of the Board are quite germane to a proper valuation on a market data approach basis of valuation of the subject lands through comparison with its selected comparables.

Since the Hoeg report was almost silent as to statutory references to the Assessment Act and as it continued to be clear that Mr. Hoeg had not stated the basis of the sections of the Assessment Act in which reside his authority as assessor to assess properties such as the subject property and spell out his duties on how to value properties under what test, and in view of the fact that no counsel represented the Appellants, the Board asked Mr. Hoeg what statute he was making his valuation under. Mr. Hoeg did not answer. The Board then asked Mr. Hoeg under what sections of the Assessment Act he was valuing the property. Mr. Hoeg did not answer. The Board then asked Mr. Hoeg what tests he used to set the general level of assessment at the percentage he did. He replied that he looked at some 220 properties and compared the assessments and sale prices of 220 properties in Cumberland County and arrived at his conclusion as to the general level of assessment. He said, and this was uncontradicted in the evidence, that in those properties in which he compared the sale prices with the assessments there was a mix of commercial and residential properties. He was then asked by the Board, what section of the Act he used to make that calculation and he wasn't able to either refer to it or to find it.

The Board noted that Mr. Hoeg used in discounting one of the sales which he had used as a comparables he had used the phrase "arms length transaction" and asked where he got that concept. He said he was not aware where he found the definition of "arms length transaction" but he thought it was probably in the Assessment Act. He looked through the Assessment Act and was again unable to find any definition of "arms length transaction" there. Mr. Hoeg then gave to the Board an explanation of what he considered "arms length transaction" meant which showed the Board that the Board and Mr. Hoeg had different concepts of the meaning of "arms length transaction". The Board then asked Mr. Hoeg if he was familiar with the possibility that definitions made in the Income Tax Act (Canada) could be imported, in certain circumstances, into the assessment process of the Assessment Act. Again Mr. Hoeg said he never knew he might, on occasion, have to go to the Income Tax Act (Canada) for definitions of words used in his duties under the Assessment Act.

The Board has reviewed carefully the answers and the general demeanour of Mr. Hoeg while giving evidence. The Board realizes that a person even of his experience, could be answering questions wrongly out of nervousness for at least part of the length of time the questions went on both as to fact and as to the basic regulations and laws applying to his duties as an Assessor, Senior or otherwise. The Board does not believe that the incorrect answers given it resulted from the nervousness of Mr. Hoeg. In viewing the report filed by Mr. Hoeg that Mr. Hoeg had very little concept (regardless of all the assessment courses that he has taken and the practical assessment experience that he has gained) of the underlying principles under which he must assess properties.

The Board refers specifically to the following (in the Assessment Act), which it will set out again in detail.

> "Section 38(1)
>
> All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the town or municipality."

This particular sub-section of the Act seems to be a valid underpinning for the duties of assessors arriving at a market value and should be in the mind of all assessors at all times when they are performing their duties under the Assessment Act.

Section 1 of the Assessment Act deals with the definition of types of properties among other things. The Board suggests that all assessors should be familiar with Section 1 of the Assessment Act and one would think that with reading Section 1 and Section 1(A), one would have been struck with the reference to the Income Tax Act of (Canada) that appears in Section 1(A), sub-section 2. In other words the Board is uncertain that Mr. Hoeg is qualified to give accurate opinion evidence concerning the assessed value of the subject property. If that judgment is unduly harsh, the Board, at the least, holds the opinion that it doubts Mr. Hoeg's opinion as to value given in this case is of sufficient degree of accuracy (both as to legal principles under which it is made up and the factual context under which those principles are to be applied) to be entitled to be given much weight by this Board.

In any event, the Board is prepared to accept those portions of Mr. Hoeg's opinion that are advocated by both parties, e.g., that the shore front lots have more value than the back lots. The Board, for the purposes of this appeal also accepts that the best possible combination of purchases for lots in this subdivision would be a mixture of shore front lot and back lots probably in multiples of each because of the difficulty of soil testing that occurred in some individual lots. As the Board understands the evidence before it, all the lots in the subdivision are approved and capable of being sold, but the Board suspects that a lot on which one cannot obtain a health permit and therefore a development permit would be more difficult to sell at a good price than a lot that would pass a soil test.

Because the sale (Sale #3)relied on by Mr. Morgan is one of the most recent sales it should be the best available comparable other things being equal. The Board notes that this sale was to combine back lots with back lots as near as the Board can tell. Because of that the Board is of the opinion that the value of $1,333.00 per lot derived from this sale is perhaps too low to make that value a fair comparable to the subject land.

Because of the error in reporting Sales #2 and #4 (being one transaction and not two), because no distinction was clearly made on the price of the shore front lots and the back lots, and because this distinction should have be applied (if it in fact existed), the Board is unable to accept Mr. Hoeg's reliance on these sales [this sale] (as opposed to any other sale) showing the back lots to be of a value of $3,000.00 per lot and being thus a good comparable to the subject lots. The Board notes the configuration of those four lots are on the mixed sea frontage, the back lots are immediately complementary to the front shore side lots as they are situate immediately in the rear of their shore front lots. Mr. Hoeg's presentation of this one sale as being two separate sales is so inaccurate in fact and the the Board is not prepared to accept sale No. 2 as properly being the determinate comparable sale for the purpose of the resolutions of this appeal. The Board is unable from the written statement of the purchaser himself to distinguish the price between the back lots and the shore front lots except to conclude that the shore front lots are more valuable than the back lots.

Sale No. 1 is not extremely helpful on the grounds that they are shore front lots only and they have been discounted by both parties on that ground. They have also been discounted as comparables by the Board since there is no evidence on this Sale No. 1 that there are any back lots in the sales package to modify the value of the shore front lots. The Board has already found the back lots-shore front lots sales package, to be the most nearly comparable type of sale package in this subdivision to the subject lots.

Mr. Morgan did not argue that the mere fact that he deeded his back lots to his son and daughter and the shore front lots are in his name meant that he bought any less than a package to protect himself. Mr. Morgan's evidence was quite clear. The only reason he bought the subject lots was that the subdivider was cutting the tree cover on the subject lots. To prevent that use, he bought the subject lots for the protection of the land he already had. Even if the assessments are different in ownership between Mr. Morgan's shore front lots and the subject back lots, these properties were related in the mind of the purchaser, Mr. Morgan, for valuation purposes. Mr. Morgan tried to discount his price of $1,500.00 a lot in 1980 as being too high because of the pressure he felt to purchase the subject lots. Because he wanted to protect his existing investment, Mr. Morgan said he was prepared to pay a premium for these subject back lots that no one else would be prepared to pay for the subject lots then or now.

Mr. Morgan tried to get the Board to accept that the only purchasers of these lands (now that his "forced" purchase of the subject lands had dried up the subdividers'supply of unsold lots) would be internal purchasers since all the lots are sold and most of them are in packages of a combinations of shore front lot and back lot and those packages, some of which were built on, would be only transferred internally especially the vacant back lots. The Board finds this concept difficult to follow and does not accept it. The Board feels a purchaser now would come and buy out a selling person's package (including his recreational residence) in its entirety and would thus buy as a desireable package, a single owner's entire combination of shore front and back lots.

Having very low regard for the valuations of the subject lands expressed by Mr. Hoeg, the best evidence the Board has of value is the price that Mr. Morgan paid for his lots in 1980. This is very unfortunate from valuation point of view since there may be many more recent sales capable of much more detailed explanation which would have perhaps forced the Board to arrive at a different result. If there were such sales, the Board did not hear of them.

The Board does not accept that the mere pressure of development, or use of the "back lots pressure" forced the purchase by Mr. Morgan of the subject lands to an undue degree. The Board accepts that, as a matter of course, that this "pressure" is a type of market demand that can be generated normally in a subdivision by a willing buyer and a willing seller and the pressure that was expended here merely is one of the items that happen to make sales, the price of which determines market value.

The Board notes there was no time adjustment made over a six or seven month period by Mr. Hoeg. The Board notes that Mr. Morgan has argued that the prices have held stable or gone down. The Board determines on the evidence before it that the amount paid for Lots 8, 9 and 10 (the subject lots) $1,500.00 a lot, in the year 1980 is the market value in January 1986.

The Board has looked to the report of Mr. Hoeg for the general level of assessment which it now has a duty to apply. From the evidence of Mr. Hoeg the general level of assessment expressed in Mr. Hoeg's report was expressed on a wrong principle in that he hade his calculations based on a comparison of the sale prices and assessments of a mixture of commercial and residential properties to arrive at the general level of assessment. The general level of assessment contemplated by Section 38(1) of the Assessment Act is that the taxation falls in a uniform manner upon all residential and resource property in the Town or Municipality. The commercial properties must not be included in this calculation. The Board is unable to accept the general level of assessment as calculated by Mr. Hoeg and it has no other additional evidence in which to determine the true general level of assessment.

However the Board notes the general level of assessment (however incorrectly calculated by Mr. Hoeg) was near 100%. To the Board's knowledge the various Assessment Departments within the province are generally striving to have their assessments equal market value. The Board further notes that the difference in assessment (made by applying a current general level of assessment to the subject property) would be of little practical importance either to the rate payer appellants or the Director or to the Municipality in this particular case. The Board was left with the options of calling legally accurate evidence concerning the general level of assessment (which the Director chose not to call in the first place), of reconvening a hearing to make a full inquiry as to the general level of assessment in the assessment area, or of applying the general level of assessment to the market value of the subject properties in some other manner.

The Board has looked to this problem and the Board notes that the legal goal of the Director should be to have the assessments of these properties under his supervision equal their market values.

Following a concept of de minimis the Board is prepared to set the general level of assessment in this appeal by assuming, based on the evidence and based on the very little differences it will cause to any party, that the application of the general level of assessment to the assessed value of the subject property here is met by setting the assessed value on this property at $4,500.00 which it now so does. The Board finds that this property is equally assessed with all other properties in the assessment region at its market value at $4,500.00.

In the circumstances of this case as just explained, the Board would ordinarily award costs to the Appellants because they have succeeded. It, however, is equally clear that Appellants should have tried their appeal first on its merits at the Regional Assessment Appeal Court level.

In view of the hesitancy of the Board to rely on the report tendered to the Board by the Director (and to which the Board in a vast majority of assessment appeal cases pays the highest degree of respect) the Board will not award costs in this matter on behalf of the Director even though the Board believes that the appeal in all its ramifications could well have been heard by the Regional Assessment Appeal Court and the reason it wasn't heard in that court is no fault of the Director.

For all the above reasons, the Board finds the market value of the subject lands for assessment purposes as of the date set by the Director, namely January 1, 1986 to be $1,500.00 per lot for a total of $4,500.00. There will be no costs for any person.

An Order will issue accordingly.

DATED at Halifax, Nova Scotia this 24th day of November, 1987.

RICHARD L. WELDON
Member

Park Projects Ltd. v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--2.1 ACRES OF VACANT SCRUB LAND LANDLOCKED WITHOUT STREET FRONTAGE OR ROAD ACCESS--UNDEVELOPABLE IN PRESENT CIRCUMSTANCES--NOMINAL VALUE--ASSESSMENT ACT, SS. 38(1), 100(1)--MUNICIPAL BOARD ACT, S. 16(1)--PRIVATE WAYS ACT

This is an appeal by P.P. Ltd. from a decision of the Halifax City Regional Assessment Appeal Court confirming the residential assessment of 2.1 acres of vacant land off the Herring Cove Road at $3,200.00. The property was originally assessed at $6,300, was re-assessed after the statutory review by the Director prior to the Assessment Appeal Court hearing at $3,200, and is valued on this appeal by the Director at $3,600. The property does not have road frontage, is located approx. 300 ft. from the street line and is covered with scrub, bushes and small trees. At the time appropriate to assessment evaluation the property was zoned R-2. The Appellant's position is that without street frontage or road access it cannot develop the subject lands and its value is zero or nominal.

HELD: The appeal is allowed. The market value for assessment purposes is $100.00. The Appellant will have costs, set at a lump sum of $50.00.

Under s.100(1) of the Assessment Act, the Board has a duty to hear the appeal de novo, and a duty to set the valuation of the subject property for assessment purposes at market value having regard to s.38(1) of the same Act. There is no dispute that the general level of assessment is 96.3%. The ownership and development pattern surrounding the subject property allow no easy access; the landlocking appears legally complete. This was accommodated for by the Assessor applying a 50% discount rate. The highest and best use of the subject land will be to hold it for future residential development as a block with access acquired from some other source. Potential uses must be ignored. We are left with the present value of the land as it sits undevelopable in present circumstances. We have no apparent market value for the property as it stands. The adjacent landowners, who are the logical purchasers, have all been approached and are not willing to make a serious offer, and two long term listings on the general market resulted in no offers. The Board is unable to find other than nominal value for assessment purposes and sets this value at $100.00. The general level of assessment reduces this value to $96.30, which the Board rounds to $100.00. This assessment can be reviewed on a year to year basis.

N.B. Application for Leave to Appeal was made to the Nova Scotia Supreme Court, Appeal Division, by the Director of Assessment. The application was granted. The Appeal Division ordered that the matter be remitted to the Board for its further consideration. The new decision will be reported in a subsequent volume.

NSMB-148-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 13, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by **PARK PROJECTS LIMITED**, from the decision of the Nova Scotia Regional Assessment Appeal Court, Halifax Assessment Region, dated May 13, 1987, respecting the assessment of 2.1 acres of land located on Herring Cove Road in the City of Halifax.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: ROBERT E. NOLAN, a principal of the Appellant, Park Projects Limited, representing the Appellant;

RANDALL R. DUPLAK, LL.B., for the Director of Assessment, Respondent.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S., 1981, Municipal Board Act, the Chairman assigned Board Member Richard L. Weldon to hear this assessment appeal at the Board's November 19, 1987, sittings at the Expropriations Compensation Boardroom, 1660 Hollis Street, Suite 904, Halifax, Nova Scotia.

This is an Appeal by **PARK PROJECTS LIMITED**, a body corporate, from a decision dated May 13, 1987, of the Regional Assessment Appeal Court, Halifax City Assessment Region for certain properties stated therein as being on the Herring Cove Road, Halifax, whereby that Court refused the appeal before it of the Appellant, Park Projects Limited.

This Decision was delivered to the Appellant as required by the Assessment Act, R.S.N.S., 1967, Chapter 14.

The history of the assessment giving rise to this appeal is as follows: The property was assessed for the assessment year 1987 as a "residential assessment Ward VII, Herring Cove Road, rear of 517 - 2.1 acres in the amount of $6,300.00." A copy of this Notice of Assessment is contained in Exhibit P-6. This assessment notice is dated January 19, 1987, and is stamped received on January 30, 1987. After the statutory review of this assessment by the Director, this assessment was re-assessed by Notice of Assessment dated March 5, 1987, at $3,200.00. This re-assessment was appealed to and confirmed by the Regional Assessment Appeal Court.

The Notice of Appeal was dated June 17, 1987, and was served on June 18, 1987 by delivery to the Director of Assessment, the City Clerk of Halifax and, incidentally, to the City Solicitor of Halifax. It was filed with the Nova Scotia Municipal Board on the same date. The Notice of Appeal has appended to it a photostated copy of the decision complained of and on the back of that decision was noted the fact that it had been "mailed by recorder" May 19, 1987.

On hearing the viva voce evidence of Mr. Nolan the Board is satisfied that the Notice of Appeal was served within the time and upon all the persons prescribed by the Assessment Act. The Board is further satisfied that the Notice of Hearing had been served on all persons required to be served and that all other jurisdictional procedures have been performed by the Appellant in order to give the Board jurisdiction and the Board assumed jurisdiction to hear this appeal.

The appeal was heard on November 29, 1987, starting at 10:00 o'clock in the forenoon at the place mentioned above.

Counsel for the Respondent filed an estimate of evaluation prepared by the assessor for the subject property prior to the commencement of the hearing. This report of valuation is before the Board as Exhibit P-4.

That report, Exhibit P-4, describes the property as follows:

> "The subject property is located at the rear of Civic Nos. 517 and 519 Herring Cove Road, approximately 300 feet from the street line. The site is comprised of 2.1 acres of undeveloped land covered with a mixture of scrub, bushes and small trees. The subject property does not have any road frontage. It is bordered on the north by lands of the City of Halifax, on the east by lands of Blunden Construction Company Limited, on the south by Blunden Construction Company Limited and on the west by lands of the Halifax Housing Authority. The subject lands rise in slope from east to west."

This property is also shown in the report on several planning diagrams and on an aerial photograph dated 1983. For ease of description, the Board considers the property is described as having as its east boundary the boundary parallel and adjacent to the Herring Cove Road, its west boundary obviously opposite to that etc. and so it is described in the rest of this decision as north, south, east and west although the bearings are somewhat different as is shown on the diagrams. The witnesses during the hearing also used this same convention. The information contained in the site plan is somewhat inaccurate and is that on the eastern boundary of the subject property there is a property wide enough to provide access which we will call the "Oakley property" and on the northeast corner of the property is another small property that appears to abut on a street called Roy Street which the Appellant says does not exist on the ground and the aerial photographs tend to bear him out. Subject to those two caveats the description of the property contained in the report is accurate enough for the purposes of this decision.

The state of the property at the relevant time which would have been December 1, 1986, was that it was zoned R-2 although an R-3 zoning was in the process of negotiation with the City of Halifax and came into effect in mid-1987. At the time appropriate to evaluation (being the time set by the Director), January 1, 1986, the property was also zoned R-2.

Mr. Nolan gave the sole evidence for the Appellant. He noted that he had been engaged in some considerable early land developments in this, the Spryfield area of Halifax. He noted that this 2.1 acre block was the residue left after sale of other lands to the west of this to a partnership consisting of Central Mortgage, the Nova Scotia Housing Commission and the City of Halifax. This sale isolated this particular piece of land completely from any roads and there is no right-of-way access reserved. Development to the subject land's west boundary has been made (in accordance with the aerial photograph and other evidence) in multiple family housing with no allowance for right-of-way or street access to the common boundary of the properties. The Board notes that this abutting development is apparently a governmental action. It would not ordinarily be permitted to an ordinary developer to develop residentially up to a boundary in modern times without allowing for road access to its next adjacent undeveloped neighbour.

There is not the same apparent development on the north boundary of the subject land but there appears to be a major grade difference between it and its northern neighbour. In any event the northern neighbour appears also to be the partnership or the City of Halifax.

On the east boundary of the subject lands Mr. Nolan testified that, with the possible exception of the Oakley property, there was no land purchasable for access from the subject lands to the Herring Cove Road. The Blunden property was for sale at a price out of proportion to value realizable by development of the land that the Appellant owns since the Blunden land was developed and for sale as a large expensive parcel of industrial or commercial land. He also said tht there was a steep grade between the Blunden land and the subject land.

On the south boundary of the subject land the ownership is private and development has not come near the boundary of the subject land according to the 1983 map or according to the aerial photograph and it is treed, and is undeveloped (as is the subject property) for a considerable distance. Mr. Nolan also pointed out that the lands to the south of the subject land, although they appeared to be one block of trees, are actually divided into a series of individual ownerships.

Mr. Nolan said that in 1984-85 he made some sort of an offer for the Oakley property which was then vacant at some $24,000.00 and Mr. Nolan says that that offer was not accepted and that to his knowledge the property was subsequently sold a year or two later at a value put to him of $29,000.00 with which value he did not disagree. There is now a duplex located on the Oakley property which essentially blocks the width of that property and thus makes the Oakley lot economically unsuitable as a possible right-of-way to the subject lands.

In order to get street access in a practical manner to the boundaries of the subject property one would have to come from either Herring Cove Road or from the street running through the previously mentioned residential housing complex built by the partnership, namely Graystone Drive. Graystone Drive, being the nearest public road to the subject property, although somewhat closer to the northeast corner of the subject property than Herring Cove Road is to the northwest corner of the subject property, is still a considerable distance separated from the subject property. Mr. Nolan stated that he approached the City of Halifax in order to get access to Graystone Drive and he was told there was a tendering process available to attempt to purchase access rights from the City. He did not inquire further.

Mr. Nolan testified that the Appellant had listed the subject property for sale on two several years at an indeterminate amount. On the occasion of each listing the Appellant invited offers and it received what Mr. Nolan said were "no serious offers". As near as the Board can ascertain it had packages of land to sell of which the subject property was a portion. Since the Appellant had financed these multiple properties with a blanket type of financing, it was necessary for it to get a package price so Mr. Nolan explained to the Board that its listings at $50,000.00 or more were construed in his mind in such a way that if it received $40,000.00 for the other properties in the package that it would need to receive say $10,000.00 for the subject property and vice versa. In any event, the Appellant was clearly inviting offers on the subject land and Mr. Nolan said it received no offers and no serious inquiries. Mr. Nolan discounted telephone inquiries as being serious. Mr. Nolan noted he then tried maximum efforts to sell the subject land to its major abutting land owners, namely the City and Blunden Construction. Blunden informed him that it was trying to sell land not buy land. The other adjacent owners and Central Mortgage all told him that they could not buy land for stockpiling under their present legislative mandate and they had no present need for the subject lands.

Mr. Nolan described the land as being steep. Mr. Nolan noted that his company had an $80,000.00 mortgage on the property which was originally a blanket mortgage and still has an $80,000.00 balance (as the Board understands it) and is secured now only by this property; the other properties having been sold presumably with the consent of the Appellant's lender. Mr. Nolan takes the position that his Company cannot develop the subject land as it presently exists. It has no road access and no street frontage and that unilateral legal access is possible only by helicopter. Mr. Nolan took the approach that the land as it now stands is useless and therefore should have a negative or zero or nominal value on the assessment roll. He then went on in his testimony to criticize the methods used by the assessor in arriving at the assessed value proposed for the property.

Mr. Rodney C. Caiger, a senior assessor with the Department of Municipal Affairs responsible for the report evaluation previously mentioned was qualified as an expert to give opinion evidence on evaluation for assessment purposes on properties in Spryfield including the subject property. His report, Exhibit P-4 gave the property as of January 1, 1986, the value of $3,600.00. Mr. Caiger said he was unaware of the circumstances behind the $80,000.00 mortgage which eventually ended up apparently against the property but he was aware of the fact that there was no access. On cross-examination by Mr. Nolan he disagreed that the property contained a ridge or peak that made the subject property totally undevelopable. He said that the property was unique and difficult to value since there were no properties around that he had valued which had no access whatsoever. He said he had looked to the texts on valuation and they gave him no help for isolated type of properties. He said he was not familiar with any legislation or common law that would give such an isolated property as this access as-of-right and he made adjustments for any such lack of access. He then went further and checked with a decision of the Board in an appeal in which he had filed a valuation report on a landlocked property before. He had followed in his report for this appeal the same technique used in the report filed in the previous appeal. His opinion had been accepted by the Board in that appeal. The Board, said Mr. Caiger, by accepting his report in that appeal had implicitly accepted the same technique of valuation he used in this appeal. That property was situate in a holding zone somewhere in the Timberlea area of Halifax. He said he had seen the same approach used by a fee appraiser before the Board in another appeal that is not yet decided by the Board, the Rex Burgess appeal. He said he had inquired what to do in this situation from various fee appraisers and they suggested that he use the same discounting technique that he used there.

On cross-examination by Mr. Nolan, Mr. Caiger did not strongly defend the comparables he had used, but he said they were the only bulk land sales known to him in Spryfield. He agreed the comparables were weak because two had the MacIntosh Run flowing through them, because most of the comparables were much larger than the present lot, one was 17 acres, one was 4.5 acres and one comparable was 9.3 acres and because they all fronted on a public street. They were also not the best comparables, two being on the MacIntosh run and one on the Williams Lake Road. The road frontage of the Williams Lake Road property was very limited basically for 9.3 acres there were two 50 or 60 foot accesses, one through the extension of Forward Avenue and one facing on the Williams Lake road of approximately the same width. Mr. Caiger said regardless of the differences of the properties they were good in that they were quite close in location to the subject property and there were no other bulk sales of vacant land in the area other than developed and approved building lots.

Mr. Caiger said that he could not value property for its future potential use or its highest and best use but only its use for assessment purposes because of the authority of a case of our Appeal Division, Bowater Mersey Paper Company Limited v. Digby Municipality, 33 N.S.R. (2nd), 181. Leave to Appeal refused, S.C.C., Nov. 6, 1979. When confronted with a copy of the decision, Mr. Caiger could not locate the principles involved either in the headnotes or in the body of the decision (and indeed he should not be expected to do so). Mr. Caiger said that this principle stated above was being taught (with this case as an authority) in the assessment courses that he attended regularly in refreshing his assessment experience. Mr. Caiger was asked no questions and made no comparisons between the evaluation section of the Assessment Act as it existed at the time of the Bowater appeal and at the present. Mr. Caiger was not prepared to say that the property was not worth the $80,000.00 mortgage on it or at least the listing values that had been put on the property and which seemed to hover around the $50,000.00 level.

Mr. Caiger explained to the Board that he took the best comparables he could find, made the usual adjustments and then made one heavy adjustment of 50% because it had no road access or indeed any other apparent access. He referred to a George Lordly case in which he had given evidence before the Board in which he had used exactly the same technique for an isolated point of land. The Board has looked to its files and found the Estate of George R. Lordly appeal, NSMB-136-86-A.

The Board will deal with this decision more fully when it considers balancing the evidence as summarized above.

The facts as to location of land, size and access to the land, topography to the land are basically not in dispute. The values that are to be put on the land range from $0.00 or a nominal value as advocated by the Appellant to a high of some $80,000.00 and there is some evidence to support both those extreme positions and other positions in between. There is some evidence that tends to support the Director's view that the property is worth $3,600.00.

The Appellant's position is simply this that it has a piece of unusable residential R-2 land. It has attempted to sell the subject land to the abutting land owners and it has attempted to sell the subject lands on the multiple listing market and that it has been unsuccessful in all attempts to sell the subject lands. Mr. Nolan says that with the lack of access and especially with the lack of street frontage the Appellant can do nothing with the subject lands.

Mr. Duplak's position for the Director is that the Director's valuation and assessor has followed an appropriate technique to come up with a value of a difficult piece of land.

Mr. Duplak alludes to the fact that much higher values can be put on the subject lands and there may be a large present value to the owner although the owner now discounts that value for assessment purposes. Mr. Duplak also asks for costs in the event that the Director is successful in sustaining his present opinion which is $400.00 higher than the amount allowed by the Regional Assessment Appeal Court.

The Board has a duty to hear the appeal de novo under Section 100(1) of the Assessment Act. The Board has the duty to set the valuation of the subject property for assessment purposes having regard to Section 38(1) of the Assessment Act which reads as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the town or municipality".

In passing it is noted that there is no dispute in this case that the general level of assessment figure to be applied in this particular case is 96.3%.

Mr. Caiger admits that the property was difficult to assess because of its isolated location caused by surrounding ownerships which allowed him no easy access to travel rights-of-way or roads. He says he accommodated for that factor in his report and he says he used a discount rate of 50% for the same reasons he did so in the Lordly case cited above.

The Board has reviewed the Lordly case in a great deal of detail and will set out some quotation and excerpts from the file copy of the decision, (page references will be to the file copy of the decision).

> "Page 15:
>
> The Board accepted Mr. Caiger as expert witness in matters of assessment.
>
> Mr. Caiger chose to use the Direct Sales Comparison approach in valuing the subject property as the most appropriate and reliable method for a 200 acre parcel of vacant land. To find comparable sales Mr. Caiger said he looked for records of sales of landlocked parcels in the area of the subject and eliminated in his search any lands with road frontage or sales which were not at arm's length....
>
> Sale #1, ...Mr. Caiger adjusted this sale price to compensate for road frontage, lake frontage and size on Sale #1 by an overall physical adjustment of 40%...
>
> Sale #2, ...210 acres in two parcels with frontage on Tomahawk Lake... was used as a comparable by Mr. Caiger because these lands were landlocked... He adjusted... for location because of the distance of the lands from any development...
>
> Sale #3, ...a 279 acre parcel with access to the Hammonds Plains Road... These lands have no road frontage but access the Hammonds Plains Road by a 66 foot right-of-way. ...When he was valuing the subject property he was not aware of a road to the subject property... Mr. Caiger walked the subjet property using this road for access but found no other road access...
>
> Mr. Caiger disagreed... that the subject property was 'landlocked' and did not agree that the owner would need to obtain easements or rights of way to gain access to the property. He disagreed that access was needed to the centre of the property, believing that access to the edge of the property would be sufficient. Finally he stated that a completely new road was unnecessary because a 'minimal' road existed from the industrial park to the subject which needed upgrading only and was shorter than that proposed by Mr. Holden....
>
> Mr. Caiger confirmed that he had valued the subject

> property as vacant, inaccessible bulk land. He had not used the Cost of Development approach because he did not think it appropriate... This approach to value is used for lands ready for development and presently in demand, which Mr. Caiger felt was not the situation of the subject property....
>
> The assessor used the direct sales comparison approach to value the subject property, the most appropriate to the subject of the three general approaches to value generally used. The three comparable sales of property chosen by the assessor were analyzed in detail and adjusted where necessary to allow for differences between the comparables and the subject...
>
> The Appellant submitted no comparable sales in evidence...
>
> The Board accepts the assessor's opinion of value of the subject property. While Counsel for the Appellant raised questions about the validity of the adjustment made by the assessor to the comparables used to establish a range of market values for properties similar to the subject, no alternative adjustments were presented. The assessor acknowledged that sales of vacant, landlocked, bulk land in the general vicinity of the subject were difficult to find and agreed that adjustments for physical characteristics and location are essentially subjective. The Board prefers the analysis and conclusions of the assessor in the determination of the market value of the subject property to that of an 8 year old professional appraisal of the property or the evidence of a real estate agent with two years' experience and no expert status in the field of property appraisal.
>
> On the matter of classification of the subject property the Board cannot agree with the assessor...
>
> Counsel for the Director argues that the Board has the jurisdiction...to increase the assessment of that portion of the subject property not appealed because the Board has all the powers of the Regional Assessment Appeal Court... The Board declines to do so, having heard evidence on the market value of only two landlocked vacant parcels of bulk land within the municipality."

The Board has quoted extensively from this decision and believes in conclusion that Mr. Caiger has used a technique that was approved of in the Lordly decision in arriving at the value in this particular case. At page 21 of his report, Mr. Caiger has this statement:

> "Sales data on land without street frontage is non-existent in the Spryfield area and therefore an adjustment for this deficiency based on market data cannot be made. An adjustment however must be made to account for the superior physical characteristic of street frontage and each comparable is therefore adjusted by a minus 50%".

This is a technique that was used by Mr. Caiger before although at a slightly different percentage and with other factors concerned in the _Lordly_ appeal.

On the review of the _Lordly_ appeal it appears that the _Lordly_ appeal dealt with a much larger area of land in a different zone and that there were in fact legal methods to access to the lands through existing or disused roads. In the particular parcel of land here involved there is an extremely small parcel compared to the _Lordly_ property suitable perhaps for development. In the present case the landlocking is apparently legally complete as far as the existing documentation is concerned. Mr. Nolan is aware that some tendering process may be used with the City to attempt to get access or street frontage. The _Private Ways Act_, R.S.N.S. 1967, Chapter 237, may allow the Appellant to apply to the City for access to the subject lands. No other common law or statutory references have been made to the Board which show that the Appellant might apply to get ground level access to his land through some forceful unilateral legal process. The Board assumes and has taken as a fact that the Appellant as an ordinary body corporate has no expropriation powers by which it could enforce access to its property.

Mr. Duplak takes the position that the Appellant should not be able to "shoot himself in the foot" by deeding away a large portion of his land leaving himself landlocked and then ask for relief from assessment and therefore taxation because the land leftover is useless. With all respect to this argument of Mr. Duplak, the Board puts this hypothetical "If the present assessed owner had inherited this particular piece of land as it now exists would it be valued exactly the same for assessment purposes as it is now?" The inheritor would not, in any way, have "shot himself in the foot" either by paying too much for the property or by carelessly deeding away butting land. The property would still be assessed at the same value to an innocent inheritor as it would be to a negligent owner who neglected to reserve himself a right-of-way when he sold off part of his land. How this circumstance of the present isolation of the subject land arose does not necessarily affect the present value for assessment purposes in the view of the Board.

The Board would ordinarily look to the present market value of the property as being taken to be its value at its highest and best use. The Board looks at all the evidence adduced and says that the highest and best use of the subject lands is for future residential development in conjunction with the residential developments that are already at its boundary and for holding for future use as the same, or for similar possible addition to the commercial use (after rezoning) with the land adjacent to it on the Herring Cove Road side of the property, or for long-term residential use with access through the lands that lie to the south of it which don't show any sign of present development. The present holding for these future uses would be the highest and best use of the subject land in the view of the Board. That highest and best use would establish the present market value of the property i.e. to be held for future residential development as a block with access acquired from some other source.

There is evidence that access could have been acquired to the Herring Cove Road for land purchase of some $29,000.00 but there were no costs (adduced in evidence to show) the development cost of the over 300 feet of road to be built.

The comparables used by Mr. Caiger reflect an actual sale price in each case and they reflect difficult lands to develop for one reason or another. Two of the comparables are intersected by MacIntosh Run which is a low unpleasant area. The other selected property had problems with access because of the grades on the Williams Lake Road and the lands behind it. These comparables were sold at market and the Board feels that their highest and best uses were the proper purposes for which they were sold, namely bulk land suitable for difficult residential development. The market value would have reflected their highest and best use and would have generated an assessment value because market value, assessment value and the highest and best use value co-existed in one time frame. All three aspects mentioned occurred at the same time.

We have no apparent market value of the subject property as it stands. The logical purchasers, being the adjacent land owners, have all been approached and have not been willing to even make a serious offer. The general market has been approached by two several long term listings. It was uncontradicted that these listings were inviting offers and that no offers were received.

Mr. Nolan tried to make a point that the comparables used, especially the ones through which the MacIntosh Run flowed, were improper comparables on the grounds that they were not nearly similar to the subject property. It is clear to the Board that they were somewhat dissimilar to the subject property. According to Mr. Caiger they were the best he could find. He made major adjustments in them to make those sales equivalent or comparable and therefore related to market value cf the subject property. The Board believes that Mr. Caiger's approach to market value in this particular case has resulted in an expression of the value of the highest and best use of the subject property. Highest and best use value has been previously mentioned by the Board in this decision. If the highest and best use were always the test to market value for assessment purposes the value so arrived at by Mr. Caiger would be at least the present value of the property and therefore the assessed value of the subject property, subject to an adjustment for general level of assessment (which is not an issue in this particular case).

Mentioned by all parties was the Bowater Mersey Paper Company Limited case by our Appeal Division. The headnote at page 181 has this quotation:

> "...REAL PROPERTY TAX - TOPIC 5263
> Valuation principles - Current or present use - The Nova Scotia Court of Appeal stated that the concept of highest and best use (from expropriation cases) should not be applied in assessment cases (see paragraph 27)."

At page 195 of that decision, paragraph 25, Cooper J.A. deals with the question of use:

> "In considering this issue of water frontage enhancement so-called I think it important to keep in mind that the land here is not being expropriated but merely assessed for purposes of municipal taxation - a yearly process [emphasis by the Board]. In Sun Life Assurance Co. of Canada v. Montreal, [1950] 2 D.L.R. 785, Supreme Court of Canada, Rinfret, C.J.C., said at pp. 788, 789:
>
> 'I need not insist on the point that a municipal valuation for assessment purposes is not to be made in accordance with the rules laid down with regard to the valuation of a property for expropriation purposes. One main ground why such a course should not be followed is that the expropriation of a property means the permanent divesting of the owner and should legitimately, therefore, take into account the present value and all the prospective possibilities of the property, while the municipal valuation is generally speaking, only made for one year, or, in the case of the City of Montreal, for three years, with certain provisions for modification if certain events happen, such as alteration, improvement, fire, etc. The rule was laid down by Lord Parmoor in Gt. Western & Metropolitan R. Cos. v. Kensington Assessment Committee, [1916] 1 A.C. 23, at p. 54, that in such a case, "the hereditament should be valued as it stands and as used and occupied when the assessment is made". In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment. In particular, in the present cse, there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change.'
>
> I cannot find here any evidence of prospect of change

> throughout the period of assessment.
>
> I refer also to B.R. Wood Estate v. Municipality of Queens (1971), 2 N.S.R. (2d) 798. The assessed property there consisted of 5,000 acres of land with 11 miles of sea-shore frontage and seven miles of lake frontage. Much was made in that case of how the property could be developed for recreational purposes. The County Court judge there reduced the assessment of $130,000.00 to $60,000.00 and an appeal to this Court was dismissed. The judgment of the Court was delivered by McKinnon, C.J.N.S., who quoted and relied upon what Rinfret, C.J.C., said in the Sun Life case, as I have done here see also McGray and McGray v. The Municipality of the district of Yarmouth (1977), 18 N.S.R. (2d) 11; 20 A.P.R. 11.
>
> There was reference at the hearing before us to highest and best use as the standard which should be applied in assessment and expropriation cases alike. I think it a mistake to take a concept particularly applicable to and understood in one situation and apply it to another. I would leave the concept to expropriation cases. The guidance in the Sun Life case is clear and sufficient in assessment cases.
>
> As I have come to the conclusion that no value for assessment purposes should be attributable to water frontage enhancement I need not enter upon the question of whether the value reached by the assessor was right or should be reduced. I only add this. Any buyer at an auction sale, as contemplated by s. 38 of the Assessment Act, must be taken, in my opinion, as purchasing woodland not recreational property or partly woodland and partly recreational property...
>
> ...There may be recreational potential here but the realization of that purpose must be far in the future...".

In the dissent of Jones J.A. in the same case, the Board will quote from page 214:

> "The basis for assessment is set out in s. 38 of the Assessment Act [this is the Assessment Act in force at that time].
>
> '38 All property shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town

or municipality so as to ensure that taxation shall fall in a uniform manner upon all real property in the town or municipality and that taxation shall fall in a uniform manner upon all personal property in the town or municipality.'

Section 101(1) of the Assessment Act provides:

'The county court shall inquire into the matter de novo, and examine such witnesses and take all such proceedigs as are requisite for a full investigation of the matter.'

As pointed out in the Morash case, the onus was on the Company to show that the assessment was too high. The Company could only discharge that onus by showing that the general level of assessment of properties in the Municipality was lower in relation to actual cash value."

Further at page 219:

"Turning to the question of enhanced value for water frontage, this was a question of fact for the County Court Judge. He had to weigh the evidence and determine whether there was a market in the area for water frontage for recreational purposes. He concluded that because the Company did not use the land for recreational purposes the value, therefore, could not be determined on that basis. In my view, in doing so he was in error. It is not the use the owner makes of the land that determines value but the market. The assessor acknowledged that a great deal of the water frontage could not be developed for recreational purposes. The Company acknowledged, in taking an alternative position, that a considerable acreage had good water frontage. Mr. Speed acknowledged that there was a demand for lake frontage held by the pulp companies. There was evidence of cottages in the area and of lot sales. On the other hand, there was considerable evidence that the market has fallen and that much of the land was inaccessible. All of this evidence should have been carefully considered by the County Court Judge and, in my view, he failed to do so and dismissed the evidence out of hand....".

Further at page 220:

"The real issue in this case was the failure of the County Court Judge to consider the uniformity principle in relation to actual market values. This Court has repeatedly held that uniformity is the guiding principle."

In dissent, Jones J.A. did not prevail. The Board is of the opinion having reviewed in this case that regardless of the change of the wording of Section 38 of the Assessment Act since the decision in Bowater it is essentially bound to follow that case. As previously stated, the Board is of the opinion that the value arrived at by the direct sales comparison approach determined the full value of this land by considering its full potential to its highest and best use which is the test applied in expropriation cases.

The Board prefers the views of Jones J.A. in the Bowater case when he outlined the duties of the County Court Judge which have been cited in part. The preference of the Board is immaterial since the Appeal Court and the decision of Cooper J.A. makes a definitive statement that prevents the Board from using the market value that the assessor arrived at here using a method of valuation based on the highest and best use of the property; the same test of value as would be used in the Expropriation Court and which is prohibited in assessment matters under the authority of Bowater. In the Bowater case the land holdings were valued as a large bulk of "bare" land the potential use as recreational property of this "bare" land had to be ignored. In this case there is land on which the cover is useless and which the potential uses are very indefinite and in the future. In the Board's view, under the authority of the Bowater case; those potential uses must be ignored, we are left then with the present value of the land as it now sits undevelopable in present circumstances in the hands of the owner.

Mr. Nolan says the subject property has very little value to the Appellant and the evidence that contradicts that takes into account the somewhat remote potential uses of the land.

The Board therefore sets this land as having a nominal value of $100.00 for assessment purposes. The Board clearly notes the essence of Cooper J.A.'s decision. This is an assessment matter which can be reviewed on a year to year basis. This is a period of time contemplated by Cooper J.A. in Bowater. The Board further notes that another method (other than the market data approach to valuation) of arriving at the value of this particular unique piece of land, landlocked as it is, may have to be used by an assessor to arrive at a more than nominal market value.

It has been difficult for the Board to conclude that a piece of land in the City of Halifax, located in the district of Spryfield, zoned R-2 with developed residential property to one of its boundaries and developed with commercial property to other of its boundaries has a low or nominal value. The Board feels in its interpretation of the Bowater case that it is bound to ignore the somewhat remote potential uses of the subject land given the evidence that we have here. The Board is unable to find other than a nominal value for the subject lands for assessment purposes. It sets $100.00 as the value of the lands for assessment purposes. In effect the Appellant is successful in reducing the decision of the

Regional Assessment Appeal Court from $3,200.00 to $100.00.

The Board applies the general level of assessment and arrives at a value of $96.30 which the Board rounds to $100.00.

For all the above reasons the Board finds the market value of the subject lands for assessment purposes as of the date set by the Director, namely, January 1, 1986, to be $100.00.

As the Appellant was successful in this case although unrepresented by counsel, it shall be awarded costs. In view of the small sum of assessment and therefore of taxation involved, the Board will set the Appellant's costs at a lump sum of $50.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of December, A.D., 1987.

RICHARD E. WELDON
MEMBER.

NOVA SCOTIA MUNICIPAL BOARD.

Swiber v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--DIRECT SALES COMPARISON AND MARKET VALUE APPROACHES--RATE OF DEPRECIATION--ADJUSTMENT TO LEVEL OF ASSESSMENT --ASSESSMENT ACT, SS. 38(1), 89(1)(A)

This is an appeal by R.M.S. from a decision of the Annapolis-Digby Regional Assessment Appeal Court confirming the 1987 assessment of her residential property in the amount of $58,400. The property is a one-storey, single family dwelling 13 years old on a level, fully serviced 67 ft. by 113 ft. lot. The Appellant offered evidence about needed repairs and rooms requiring completion.

HELD: The appeal is allowed and the market value for assessment purposes reduced to $54,000. No costs are awarded.

The amount of necessary repairs is not excessive for such a property, and such repairs were given sufficient weight by the Assessor when calculating value by the direct sales comparison method. The evidence of vandalism, a smell from a sewer plant, and the presence of low rental housing and two commercial properties is inconclusive. In using the cost approach to value the property, the Assessor allowed for depreciation by using a 10% rate based on the normal depreciation guideline for a property 8-13 years old. This guideline states a 15% rate for properties 14-18 years old. The Board believes there must be some consideration for a more graduated scale. There is evidence of some curable physical deterioration but not an abnormal amount. A rate of 12% would be fair in this circumstance. The Board agrees with the Assessor that the best method of determining market value in this case is the cost approach. Once the estimated market value is determined, the market value is adjusted to the level of assessment in the Town. The Board therefore adjusts the Assessor's calculation by using a 12% physical deterioration rate with the cost approach, and then adjusting the resulting value to the 94.9% level of assessment existing in Digby.

NSMB-142-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by **RUTH M. SWIBER** from the decision of the Regional Assessment Appeal Court, Annapolis - Digby Region, dated March 25, 1987, which confirmed the assessment of property at 33 Queen Street, Digby, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: RUTH M. SWIBER, on her own behalf,

RANDALL DUPLAK, LL.B., on behalf of the Director of Assessment.

DECISION

A hearing was held on October 19, 1987, in the Council Chambers for the Town of Digby, on an appeal by **RUTH M. SWIBER** from the decision of the Regional Assessment Appeal Court, Annapolis - Digby Region, dated March 25, 1987, which had confirmed the 1987 assessment of her residential property at 33 Queen Street in the Town of Digby in the amount of $58,400.00. The Notice of Appeal (Exhibit S-1) dated April 22, 1987, and signed by the Appellant, was received by the Board on April 27, 1987. The grounds for appeal were basically that the assessment for her property was too high in relation to other similar properties in the neighbourhood.

There were no objections to the Board's jurisdiction to hear the appeal and the Board having satisfied itself that all matters relating to jurisdiction had been carried out assumed jurisdiction and heard the appeal on its merits.

The subject property is a one storey, single family residence with an attached garage located on a level, fully serviced lot 113 feet deep, having 67 foot frontage on Queen Street within walking distance of the downtown business and shopping area of Digby. The house has electric heat, one fireplace, one and one-half bathrooms and a full basement which is partly finished.

Mrs. Ruth Swiber gave evidence on her own behalf and called no other witnesses.

Mr. Eric Cox, the Assessor, was the only witness for the Director.

Mrs. Swiber covered four topics in her testimony. She reviewed a list of various areas of her property which were in need of repair. She also reviewed the stage of completion of various rooms within her house. She went on to explain other matters relating to the neighbourhood in which the house is situated. She commented on a nearby smelly sewer plant, two noisy commercial buildings, a low rental property near the subject property and dogs which run at large near her house. She also mentioned vandalism to her property and to two other properties in the neighbourhood. She concluded her testimony by comparing her property to the property of two of her closer neighbours.

The Board does not believe the necessary repairs listed by Mrs. Swiber are excessive for most properties that are 13 years old. The condition of a property must be considered when trying to arrive at a fair market value. When using a direct sales comparison the condition of a property would definitely be noted by an informed, willing buyer. When using the cost approach the application of depreciation should account for the current condition of the property and the Board will be commenting on depreciation later in the decision.

The Board is satisfied from the testimony of Mr. Cox that he gave sufficient weight in his appraisal to the various stages of completion, heating etc. of the various rooms, basement and garage connected to the property.

The Board does not feel that the evidence presented supports consideration of an assessment adjustment for the effects of vandalism and the smell from the sewer plant. The evidence relating to vandalism suggested that it was fairly localized and eminated from one source. The evidence given by Mrs. Swiber and Mr. Cox relative to the sewer plant was somewhat contradictory and lacking in detail as to the effect on the neighbourhood as a whole. The Board believes that dogs running loose is not a matter to be compensated for by assessment adjustment.

The evidence presented as to the effect on the neighbourhood values of the low rental housing and the two commercial properties was insufficient to reach any conclusion. The Board notes that the properties used in direct sales comparison calculations were on the same street and would reflect any market adjustment necessary.

Mr. Cox in his testimony presented evidence (Exhibit S-4) which showed a valuation for the two neighbourhood properties referred to by Mrs. Swiber in her testimony. The calculation of each was done in exactly the same manner as the Swiber property. The evidence showed both houses had a value in excess of Mrs. Swiber's property but because of a calculation error, both properties were assessed at a lower value than the property under appeal.

Mr. Eric D. Cox, an Assessor in the Annapolis - Digby Assessment Region with 15 years experience in the assessment field, was accepted by the Board as an expert in matters related to the assessment field. He gave evidence on his method of estimating the market value and stated his opinion of value for assessment purposes of Mrs. Swiber's property.

Mr. Cox reviewed his valuation (Exhibit S-3) going over the various aspects of the house in question and his approach in arriving at the estimated market value by using the cost approach and the direct sales comparison approach. He reviewed in some detail his actual calculations in estimating market value by the use of the cost approach and the sales comparison approach and discussed his reasons for choosing the cost approach as the best method.

The Board has reviewed the valuation document in some detail. In it Mr. Cox offers an explanation of depreciation which discusses physical deterioration in terms of curable and incurable with the former covering items in which the costs would justify repairing and the latter relating to matters which would be of greater cost to repair than could be reasonably expected to be returned in an increased value of the building. He goes on to state that normal depreciation guidelines are 5% for 0 - 7 years; 10% for 8 - 13 years; 15% for 14 - 18 years and 20% for 19 - 23 years. The age of the subject property is 13 years and as such Mr. Cox has used the 10% depreciation rate in the calculations of estimated fair market value by the cost approach. The Board does not believe that the depreciation guidelines can be applied as directly as Mr. Cox appears to have done. It is difficult to justify that on that last day of the 13th year the property has depreciated 10% and that on the 1st day of the 14th year it has depreciated 15%. The Board believes that there must be some consideration for a graduated scale in the intervening years.

For further clarification of this matter the Board points out that should a property be shown to be in better physical condition than is deemed normal, consideration could be given to reducing the rates described in the depreciation guidelines.

As mentioned previously, Mrs. Swiber gave evidence as to the repairs to her property which she deemed to be necessary. The Board considers that these areas constitute curable physical deterioration. Mr. Cox was aware of these items as he received a tour of the property from Mrs. Swiber when he visited to do his valuation, and they must have been taken into consideration when Mr. Cox rated the property in very good condition. However, the Board does not believe Mr. Cox gave any weight to the repairs necessary when choosing his depreciation rate of 10%. As his own testimony indicated that he only chose the 10% rate because it fell within the 8 to 13 year category. In choosing a rate somewhere between this 10% and 14% due consideration must be given to the state of repair of the property. As there is some evidence as to the fact that there is some physical deterioration (curable) to the property but not an abnormal amount the Board finds a rate of 12% would be fair in this circumstance and would so adjust the calculation for the cost approach.

When the Board reviewed the comparison adjustment chart included as part of the sales analysis approach in the valuation report it noted near the bottom of the page an adjustment for level of assessment of 94.9%. A level of adjustment is a percentage calculated annually by comparing actual sales within a municipal unit with their assessed value. This level of adjustment is applied to the adjusted fair market value calculation for the two properties used in the sales comparison to bring the properties to the general level of assessment for residential and resource properties as calculated for the Town of Digby.

The calculated fair market value for the two comparable properties under consideration were $57,200.00 and $55,900.00. Both these figures had been reduced by 5.1% in arriving at a value for assessment purposes.

The question arises as to why this adjustment for level of assessment was not applied to the direct cost approach method.

Section 38(1) of the Assessment Act states that:

> "All property shall be assessed at its market value, being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the town or municipality."

There are a number of acceptable ways in which to arrive at market value of which the cost approach, the income approach and the direct sales comparison approach are the three most widely used. In this particular application Mr. Cox has chosen to look at the cost approach and the direct sales comparison approach in trying to arrive at market value. In his final estimate of value Mr. Cox chooses the cost approach as the best method of determining market value in this particular case and the Board does not disagree with his conclusion because, as pointed out by Mr. Cox, there were too many adjustments made to bring the other properties in line with the subject property.

Once the estimated market value of a property is determined by whatever method selected the assessor must then turn to the second part of his duties as outlined in Section 38(1) of the Assessment Act which is to have regard to the assessment of other properties in the Town so as to ensure that taxation falls in a uniform manner upon all residential property in the Town. It is at this stage where the adjustment for level of assessment should be applied. In other words, the adjustment for level of assessment is not applied to any amount until that market value is first determined using the most appropriate method.

In this particular case, the evidence shows that adjustment for level of assessment for the Town of Digby is 94.9% and the Board would apply this percentage to the amount arrived at in the calculation of the cost approach after giving effect to the change in depreciation previously mentioned. Therefore the Board adjusts the summary of the cost approach calculation on page 15 of the Valuation Report as follows:

Total New Cost	$58,009.00
Less Physical Deterioration $58,009. x 12%	6,961.00
	$51,048.00
Add:	
Land Value	5,467.00
Pavement	350.00
	$56,865.00
Adjustment for Level of Assessment (94.9%)	$53,965.00
ROUNDED:	$54,000.00

Although the direct sales comparison approach has been discounted for this case because of the number of adjustments necessary, the market value arrived at by using the direct sales comparison approach does add some support to the above result.

Section 89(1)(a) of the Assessment Act gives the Board the right to "confirm, reduce or increase the valuation of the property that is subject to the appeal...". The Board hereby reduces the market value for assessment purposes for the property of Mrs. Ruth M. Swiber, 33 Queen Street, Digby, from $58,400.00 to $54,000.00.

The Board awards no costs to any party.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 28th day of October, A.D., 1987.

MICHAEL G. JOHNSON, C.A.,
Chairman.
NOVA SCOTIA MUNICIPAL BOARD.

Uecker and Uecker v. Director of Assessment

ASSESSMENT—RESIDENTIAL—MARKET VALUE—COST APPROACH AND MARKET DATA APPROACH--ASSESSMENT ACT, S. 38(1)--MUNICIPAL BOARD ACT, S. 16(1)

This is an appeal by a husband and wife from a decision of the Yarmouth Regional Assessment Appeal Court that reduced the assessed value of their property on Hector St., Port Maitland from $61,100 to $60,000. This subject residential property consists of a bungalow and double attached garage on a small, dead-end street. The difference in valuation between the Appellants and the Director is $3,700.

HELD: The Board finds the value for assessment purposes to be $59,700, the figure presented by the Director. There will be no award of costs.

The Board accepts the conclusions as to market value contained in the Assessor's report. These were made by applying the market data approach. While the Board is nervous about the distances from the subject property of the comparables selected, the Assessor is more familiar than the Board as to the availability of appropriate comparables and the Board cannot on the evidence do otherwise than accept the Assessor's evidence. The Appellants' criticisms of the assessment report primarily went to the cost approach and the Assessor did not rely directly on this approach in arriving at his valuation.

NSMB-147-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, Chapter 14;

- and -

IN THE MATTER OF: **MARTIN UECKER** and **GERTRUDE UECKER**, Appellants ;

- and -

IN THE MATTER OF: **THE DIRECTOR OF ASSESSMENT**, Respondent.

BEFORE: RICHARD L. WELDON, LL.B., Member.

COUNSEL: MARTIN UECKER on behalf of himself and GERTRUDE UECKER,

RANDALL DUPLAK, LL.B. on behalf of the Director of Assessment.

DECISION

Pursuant to Section 16(1) of Chapter 9 S.N.S. 1981, Municipal Board Act, the Chairman assigned Board Member, Richard L. Weldon to hear this assessment appeal at the Board's October 29th, 1987, sittings at the joint Council Chambers of the Town of Yarmouth and the Municipality of the District of Yarmouth, 403 Main Street, Yarmouth, Nova Scotia.

This appeal is by a husband and wife apparently the assessed owners of property on Hector Street, Port Maitland, from the decision of the Regional Assessment Appeal Court Yarmouth-Clare Assessment Region, made May 11, 1987, which reduced the assessed value of that property from $61,100.00 to $60,000.00. According to the viva voce evidence adduced the property is owned by both the Appellants, but the decision of the Regional Assessment Appeal Court treats Gertrude Uecker as being the assessed owner.

The Notice of Appeal was dated June 2, 1987, and was received by the Board on June 4, 1987, and is marked Exhibit U-1. Since this Notice of Appeal is somewhat different from other Notices of Appeal the Board has received in other matters, it is set out here essentially in full:

> "I hereby give notice that I like to appeal the decision of the Vice Chairman of the Regional Assessment Appeal Court, made on the 14. May 1987.
>
> The ground of appeal is as follows.
>
> The decision by the Court says and I quote "The Uecker property does appear slightly superior in same respect such as landscape and location". Two houses given for comparison to the Vice Chairman, are not more then 100 feet and 300 feet from the Ucker property. So the location is the same.
>
> As for landscaping, how can the Vice Chairman judge the landscaping from the picture submitted. The landscape in the picture was covered with snow?
>
> During the hearing the Assessor never brought up the subject of landscaping. I only can assume that in the private conversation the Assessor had with the Vice Chairman, after the hearing, this supject was up for discussion.
>
> In his decision, the Vice Chairman never adressed himself to the comparision I made in my presentation.
>
> One house 300 feet from the Uecker property was build in 1986 for a cost of app. $70000.-, and is assessed for only $59000.-. The other house 100 feet from

> the Uecker property is on a double lot, has a garage, is well landscaped and is used as a business, is assessed for $50200.-.
>
> I am looking for a fair judgement.
>
> Respectfully
>
> (Sgd.)
> MARTIN UECKER & GERTRUDE UECKER"

This appeal was heard pursuant to the Notice of Hearing herein. The hearing commenced at 10:00 a.m. and concluded at 2:30 p.m. the same day.

The Appellant proved appropriate service of the Notice of Appeal and Notice of Hearing. With the consent of all parties the Board assumed jurisdiction to hear the appeal on the merits. The Board is satisfied that the Appellant has properly carried out all the procedural requirements giving the Board jurisdiction.

The subject residential property consists of a bungalow and double attached garage built on a lot on Hector Street, a small street in Port Maitland, which is on the sea side of Highway No. 1. Hector Street is a dead-end street which ends in a turning circle. It is a small street in the sense that approximately ten or twelve individual lots face on it. The subject property on Hector Street is described in the report of valuation of the property made by Basil F. McGuigan, assessor, being Exhibit U-5 herein. On page 1 of his "summary of facts and important conclusions", the size of the lot is said to be 100' x 105'. The Deed description under Schedule "A" of the report shows the size of the lot to be 116' x 82' x 163' x 100'. The neighbourhood of the subject is probably properly described on that same page 1 of the report "as being a quiet street with a fairly even mixture of bungalows and multi-storied dwellings. The bungalows range in age from one to twenty years. Others are in excess of 60 years of age".

Mr. Uecker testified for the Appellants. Mr. Uecker on behalf of both Appellants filed a series of photographs during the presentation and relied mostly for his evidence of valuation on the report of the appraisers and derivations from figures filed by the Director.

The Director called one witness, an assessor, Mr. Basil F. McGuigan.

There seemed to the Board to be a simmering dispute between the parties. Under analysis there appears to be little discrepancy between the parties as to the proper assessed value to be placed on the subject property. Mr. Uecker for the Appellants contends that the assessment of the Appellants' property ought to be $56,000.00 which would be a reduction from the amount allowed by the Regional Assessment Appeal Court of $4,000.00. The evidence adduced as to the Director's best estimate of the market value as of January 1, 1986 of the subject property which is contained in Exhibit U-5, is $59,700.00. The difference between the Director's position as to value of the subject property and the position of the appealing taxpayers is therefore $3,700.00. It is within the parameters of this spread in value that perhaps the rest of this decision ought to be read.

Mr. Uecker's evidence seems to have the thrust that the Appellants were treated unfairly in relation to some of their other neighbours who had equal or superior properties to the Ueckers and had lower assessments than the Ueckers did.

Mr. Uecker made constant allusions that he felt that these lower assessments of his neighbours were made for inappropriate reasons. He led no evidence that proved this. Even if he had adduced such evidence, this Board has no jurisdiction to discipline assessors who act inappropriately in the performance of their duties as assessors.

When the Appellants had this assessment problem, Mr. Uecker had gone to the library, borrowed books on valuation, and studied the subject of real estate valuation. He therefore believes he could interpret and could deal with the various testimony as to valuation given at the Regional Assessment Appeal Court and to the Board. Mr. Uecker felt he was able to analyze the figures given concerning valuation and to question them.

Mr. Uecker in essence gave a presentation to the Board which the Board has before it as Exhibit U-9. This written presentation is a summary of the cost approach (per his efforts) showing that the subject property under the reproduction cost approach method has a market value of $61,113.00, the Sears property, one of his comparables, a market value of $62,133.00 and the Smith property, another of his comparables, a market value of $69,082.00. From that point of view his property was assessed originally at $61,100.00, the Sears property was assessed at $50,200.00 and the Smith property was assessed at $59,000.00. The Board assumes from that, that Mr. Uecker contends these comparables were assessed correctly, that they should be the correct test, as to value of the subject property and that his property should be reduced proportionally to fall in line with the Smith and Sears comparables.

Mr. Uecker also cross-examined vigorously and for considerable time Mr. McGuigan. Mr. Uecker's well-organized and well-directed cross-examination of that assessor made several telling points which the Board will deal with to some extent when it deals with the conclusions as to market value made by Mr. McGuigan.

Mr. McGuigan's report, Exhibit U-5, was extremely easy to follow, with appropriate photographs that made it easy for the Board to evaluate the compatibility of the comparables suggested in the report with the subject property. He noted that the market value for this purpose was to be as of January 1, 1986. Mr. McGuigan discussed three approaches of calculating market value: cost approach, market data approach and income approach. He discarded out-of-hand the income approach. The Board agrees with this portion of the report. Mr. McGuigan then said that sales were not prevalent in the area and sales of raw land were almost non-existent and therefore he was unable to provide a raw land cost (for use in the cost of reproduction approach) from known sales of raw land. He therefore went to some five sales of properties in the immediate area to the subject property, costed the improvements on those, took the sale price, reduced it by the cost of the improvements thereon, and derived a land value by assuming that the land price would equal the sale price less the cost of improvements. With that land value so calculated, he proceeded to do his cost approach valuation of the subject property using that land value as a base. The Board will not go into this matter any further because both Mr. Uecker, for the Appellants, and the assessor, Mr. McGuigan, agree that the value of a serviced lot in the nature of the Appellants' land would be about $6,500.00.

In order to get the information for market data approach to valuation of the subject property, Mr McGuigan selected three properties which were many miles away in each case from the subject property and were most graphically shown on schedule "F" of Exhibit U-5. The nearest of the three selected sale properties is two miles from the subject property. One of the selected sale properties is some seven or eight miles by road and one is three or four miles by road from the subject property. The subject property on that same schedule is marked by a letter "S" and enclosed by a small circle, about the size of a dime, on the paper. (The interesting part to the Board is that all the properties used to arrive at the land value are called "comparables" by Mr. McGuigan and are all located within the small dime-sized "S" around the subject property in Schedule "F"). The Board cannot say whether this was necessarily wrong given the technique used. It does note however that the sales comparables selected are made less desirable as comparables as they become more distant from a subject property. Perhaps adjustments could have been made to some of the sales comparables which were located closer to the subject property even though the houses were considerably different. This was clearly not the opinion of Mr. McGuigan. The Board cannot say that the evidence shows he was wrong in selecting the distant sales comparables.

Mr. McGuigan, under direct examination, under cross-examination and under examination by the Board, was unable to specify why he applied a general level of assessment. He explained however how he calculated and applied the general level of assessment to arrive at the market value of the subject property for assessment purposes. The method he explained and used accorded with Section 38(1) of the Assessment Act in that all residential and resource sale prices were totalled and their assessed values were totalled and one was divided by the other to arrive at the general level of assessment. Whether or not Mr. McGuigan had a momentary mental block (as he claimed) so that he could not verbalize his authority for calculating and applying the general level of assessment to the market value of the subject property to arrive at its correct assessment or whether he did not understand the principles involved was immaterial since he in fact applied the correct principles in calculating the general level of assessment. He applied this general level of assessment to the market value of the subject property so as to determine the current value of the subject property for assessment purposes.

On cross-examination by Mr. Uecker, Mr. McGuigan showed considerable difficulty in dealing with the reproduction cost approach and some of his figures given in his various reports would tend to mislead the casual reader in the absence of Mr. McGuigan's explanations.

Mr. McGuigan explained that his function is to provide mass appraisals for assessment purposes in a very limited period of time and some error is bound to creep in.

The question is whether there was an error in this case on the evidence.

The Board has listened very carefully to all argument and evidence. The discrepancy in values for assessment purposes between the Appellants and Mr. McGuigan is a very low percentage of the total assessment of the subject property. The Board is unable to find anything particularly wrong in the valuation made by Mr. McGuigan even though it feels that he does not have the command of figures and calculations that Mr. Uecker seems to have acquired in a very short period of time while preparing for this assessment appeal. The percentage of difference between the two parties is relatively low. The Board had a very human inclination to split the difference between the parties since it believed that Mr. Uecker in his cross-examination had shaken many of the figures that were used in making his report by Mr. McGuigan. On further reflection the Board felt that its duty was merely to hear the matter de novo and determine the market value of the subject property as of January 1, 1986, and apply the general level of assessment to the market value to arrive at the value of the subject property for assessment purposes. It further points out that the criticisms made by Mr. Uecker of Mr. McGuigan's report and knowledge primarily went to the report portion which dealt with the cost approach to valuation. Mr. McGuigan did not rely directly on the reproduction costs as getting to his valuation but relied on the market data approach. The Board is nervous about the distances of the comparables selected from the subject property but believes that Mr. McGuigan is more familiar than the Board as to the availability of appropriate comparables to the subject property. Mr. Uecker did not satisfy the Board that his comparables were useful in applying the market data approach to valuation. Mr. McGuigan is more skilled than Mr. Uecker in judging the distances and what are reasonable distances in this particular area and has made adjustments for the differences in location of the sales comparables. The Board feels it cannot on the evidence find otherwise. The Board therefore accepts the conclusions as to market value of the subject property contained in Mr. McGuigan's report which were made by applying the market data approach.

In conclusion as to the value of the subject property for assessment purposes the Board finds the Appellants have not proven to a balance of probabilities that the market value of their property is $56,000.00. The Board finds that, to the same degree of probability, the value for assessment purposes is $59,700.00 as contained in Mr. McGuigan's report.

In view of the fact that there appears to be a simmering personality conflict between Mr. Uecker and the Assessor, little difference in dollar values between the conclusions advocated by the parties, no reduction of the Director's position advocated before the Board and in view of the fact that some other method of addressing Mr. Uecker's concerns might have been achieved the Board will award no costs to either party.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of November, A.D., 1987.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

Volume

6 B 1

MUNICIPAL BOARD DECISIONS

VOLUME SIX-B/1987

Part 1 (pp. 1-452)

Nova Scotia

Municipal Board

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****

DOREEN FRIIS — Clerk

CLYDE A. PAUL, LL.B. — Counsel

THIS VOLUME CONTAINS ALL PLANNING, MUNICIPAL BOUNDARY AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1987, TO DECEMBER 31, 1987.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

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PLANNING--ZONE AMENDMENT--LAND-USE BY-LAW AMENDMENT CONTEMPORANEOUS WITH MPS AMENDMENT TO SUPPORT IT--JURISDICTION OF BOARD--MUNICIPAL AFFAIRS ACT, S. 24--MUNICIPAL BOARD ACT, S. 16(1)--PLANNING ACT, SS. 50, 51(2), 54(1)(a), 60(3), 63(1)

This is an appeal by T.H.G. Ltd. from a decision of the Council of the Municipality of the County of Halifax amending its Land-Use By-law for Cole Harbour/Westphal. The amendment affected the Appellant's lot by eliminating access to a particular street in the absence of a development agreement. The Municipality contemporaneously passed an enabling amendment to its Municipal Planning Strategy (M.P.S.) designed to support the Land-Use By-law amendment. The Municipality argued the Board had no jurisdiction to hear the appeal under these circumstances. The present decision only deals with the question of jurisdiction.

HELD: The Board has jurisdiction and the Appellant is permitted to have its appeal heard on the merits.

The Board notes the similarity between the salient facts of this appeal and those of Veinott et al. v. Town of Windsor et al., a 1986 decision in which a Local Judge of the Supreme Court of Nova Scotia held that no appeal lay to the Board in these circumstances. The Board is unable to follow the Learned Judge's reasoning and is unable to distinguish Veinott on the facts. While bound to adopt the utmost degree of deference in considering the principles set out in Veinott, the Board holds itself bound to follow its own interpretation of the Planning Act. The Land-Use By-law amendment complained of is appealable to this Board.

Application for Leave to Appeal was made to the Nova Scotia Supreme Court, Appeal Division, by the Municipality of the County of Halifax. The application was dismissed on the basis that it was out of time.

NSMB-538-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **THE HARDMAN GROUP LIMITED,** a body corporate, from the decision of the Council of the MUNICIPALITY OF THE COUNTY OF HALIFAX made on March 10, 1986, amending the Municipality's Land-Use By-law for Cole Harbour/Westphal and thereby prohibiting access to commercial and multiple unit residential uses within the C-2 (General Business) Zone other than from Cole Harbour Road, Cumberland Drive or Forest Hills Drive, except by Development Agreement.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: CHARLES G. PIERCEY, LL.B., for the Appellant, THE HARDMAN GROUP LIMITED;

ROBERT CRAGG, Q.C., for the Respondent Municipality.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S., 1981, The Municipal Board Act, the Chairman assigned Board Member Richard L. Weldon to hear this planning appeal at the Board's December 18, 1986, sittings at the Board Room of the Expropriations Compensation Board, 1660 Hollis Street, HALIFAX, Nova Scotia, commencing at 10:00 a.m. The Notice of Appeal pursuant to s. 54(1)(a) of the Planning Act S.N.S. 1983, C. 9, is dated July 17, 1986, was received by the

Board on July 17, 1986, and states that the Appellant appeals the March 10th, 1986, decision of the Council (hereinafter called the "Council") of the Municipality of the County of Halifax (hereinafter called the "Municipality") amending the Respondent's Cole Harbour/Westphal Land-use By-law and thereby prohibiting access to commercial and multiple unit residential uses within the C-2 (General Business) Zone other than from Cole Harbour Road, Cumberland Drive or Forest Hills Drive, except by Development Agreement with particular reference to certain lands of **THE HARDMAN GROUP LIMITED** (hereinafter called "Hardman") being a lot A-10XYA located in Cole Harbour near Ambro Lane and Cole Harbour Road.

The Board assigned the Chairman to peruse the Notice of Appeal and the Chairman took no objection to the Notice. The Notice of Appeal was filed accompanied by a written undertaking to pay the costs of advertising the Notice of Hearing.

The land-use by-law amendment in question was passed by Council March 10, 1986. On the same date, Council passed an amendment to its Municipal Planning Strategy (MPS) which was approved by the Minister pursuant to Section 50 of the Planning Act S.N.S. 1983, Chapter 9. The Minister did not approve the amendment to the MPS until June 12, 1986, having added certain amendments of his own "...pursuant to Section 24 of the Municipal Affairs Act ...". The Minister did not approve the amendment to the land-use by-law.

Until this MPS amendment supporting it became effective law with this ministerial approval, the amendment complained of (the land-use by-law amendment) could not become effective as the unamended MPS gave no support for the land-use by-law amendment. When there is an MPS in effect the land-use by-law must carry out the intent of that MPS as set out in s. 51(2) of the Planning Act. The land-use by-law amendment thus could only become effective by unilateral action of the Municipality sometime on or after June 12, 1986, when the land-use by-law amendment should have been advertised. See s. 60(3) of the Planning Act. Notice of this land-use by-law amendment was published on June 27, 1986, in the Halifax Chronicle - Mail Star newspapers circulating in the area affected. This appeal was thus commenced within twenty-one days of the advertisement and the Notice of Appeal was filed with the Board within time.

At the commencement of the hearings at the Expropriations Compensation Board Room at 10:00 a.m. on December 18, 1986, all parties present agreed all preliminary services, filings, and advertisements had been accomplished in their appropriate forms and times. On affidavit proof of such service, the Board assumed jurisdiction to hear the appeal as far as proper service could ensure jurisdiction.

Hardman argues that the rezoning complained of affects access to its lands (Lot A-1CXYA) and makes its development uneconomical because of the diminution of access to the lands caused by the imposition of the land-use by-law amendment.

The Municipality says that the land-use by-law amendment follows specifically, and is contemporaneous with, an enabling amendment to the (MPS) and that, following the reasoning of Hall, J.C.C. (acting in his capacity of a Local Judge of the Supreme Court, Trial Division) in the case of Veinott et al v. Town of Windsor et al (1986) SW 0830[1], the Board has no jurisdiction to hear an appeal to a land-use by-law amendment which is contemporaneous with and passed under the shelter of an MPS amendment designed to support the land-use by-law amendment.

The Board notes that counsel for both parties agreed to have this jurisdictional matter disposed of before any extensive evidence concerning any issues on the merits was heard by the Board.

The Board heard sufficient evidence of a planning nature to determine that, if the Board in all other ways has jurisdiction to hear this appeal on the merits, the Appellant is an aggrieved person within the meaning of s. 63 of the Planning Act.

In the Cole Harbour area of the Municipality, within the C-2 (General Business) Zone Hardman owns a development on Lot A-10XYA located in Cole Harbour near Ambro Lane and Cole Harbour Road (hereinafter called the lands).

The lands now contain an operational mini-mall establishment of two substantial buildings (one of 3300 square feet and one of 6000 square feet). According to the Board's scaling of a diagram of the lands (Exhibit H-10), the lands have a road frontage on Cole Harbour Road of some 360', a road frontage on Cumberland drive of over 120', and a road frontage on Ambro Lane of approximately 120' and a rear line which roughly parallels Cole Harbour Road and is approximately 360' in length. These scaled dimensions would give the lot an area of at least 43200 square feet or approximately one acre. All necessary development permits were obtained for the buildings on the lot. The buildings are now all occupied. Subject to whatever restrictions to road access that might have been imposed by the Department of Transportation, and disregarding the effect of the present amendment to the land-use by-law (which is not yet in effect because of the existence of this as yet unresolved appeal), the users of the lands have the right to highway access to Cole Harbour Road, Cumberland Drive, and Ambro Lane. The present land-use by-law amendment would eliminate the access to Ambro Lane in the absence of some development agreement permitting such access.

Now it is convenient to deal with the very strong jurisdictional argument made by counsel for the Municipality, previously summarized in this decision, relying on the decision made by Judge Hall in Veinott [1]. The Board notes that if Veinott [1] bears upon the present appeal before the Board then, regardless of the Board's interpretation of the legislation in a similar factual situation, this Board feels itself bound to adopt the utmost degree of deference in considering the principles set out in Veinott [1] because of the senior status of the tribunal which decided Veinott [1].

Veinott [1]'s result appears to be grounded in common sense. If a council changes an MPS specifically to support a land-use by-law amendment and then contemporaneously passes that land-use by-law amendment, it is most probable that the land-use by-law amendment falls within the intent of the MPS. Thus the right to appeal a land-use by-law amendment which appears to be found in S. 63(1) of the Planning Act, would almost always in such circumstances result in the dismissal of the appeal since the land-use by-law amendment would almost invariably fall within the intent of the MPS. Veinott [1] abounds in common sense. Does it correctly state the applicable law?

Veinott [1] contains the following statements which are of interest to those who are looking for guidance in the problem of interpreting the Planning Act as it affects the factual positions existing in this appeal and as existed in Veinott [1].

> "[p.3] The law governing the procedure to be followed respecting the adoption and amendment of a planning strategy ... as well as the passing of by-laws to implement the planning strategy, including the passing and amending of land use by-laws, [emphasis by the Board] is included in the Planning Act. ...it is clear, in my opinion, that no appeal lies to the Nova Scotia Municipal

Board in the circumstances that exist here.

Section 36 authorizes ...a municipal planning strategy ... upon approval of the Minister...

Section 50... provides for the amending of a municipal planning strategy ...as follows:

> (1) ...may be amended or replaced [emphasis of the Board] ...same procedure... as for ...adoption...
>
> (2) An amendment [emphasis of the Board] ...is subject to the approval of the Minister ...Sections 42 and 43 apply mutatis mutandis...

Sections 51, 59 and 60 outline the procedure for the passing and amendment [emphasis of Board] of Land-Use By-laws...

> 51(2) A council shall not adopt or amend a land-use by-law except to carry out the intent of a municipal planning strategy.
>
> 59(1) Section 42 applies mutatis mutandis to the adoption of a land-use by-law.
>
> (2) Where a land-use by-law is being adopted to implement a planning strategy, the procedures required under Section 42 to adopt [emphasis of the Board] the strategy and by-law may be carried out concurrently.
>
> (sic)(4) The adoption [emphasis of the Board] of a land-use by-law to implement a planning strategy is not effective until approved by the Minister and Section 43 applies mutatis mutandis to the approval of the Minister.
>
> 60(1) A council may by by-law amend a land-use by-law ...the provisions of this Act respecting the adoption [emphasis of the Board] of the by-law apply mutatis mutandis to its amendment.
>
> (sic)(4) The amendment of a land-use by-law does not require the approval of the Minister.
> ...

Section 63(1) provides for an appeal to the Municipal Board of a municipal council's decision respecting amendments to land-use by-laws.

> 63(1) The amendment ... by a council [of]... the land-use by-law may be appealed...

> The jurisdiction of the Municipal Board for the purposes of this application is limited to the power and authority vested in it by the provisions of the Planning Act and its jurisdiction to hear appeals of this nature is limited to appeals under section 63.
>
> From the foregoing it will be seen that an appeal lies to the Municipal Board only where the decision of the municipal council involves simply an amendment to a land-use by-law.
>
> Although it may be said that the end result of... Council's action...was to amend the...land-use by-law, the Town of necessity did not follow the procedure under section 60 but instead followed the procedures under sections 50 and 51. Obviously, it recognized that the land in question could not be re-zoned in the desired manner as such an amendment would not have been consistent with its then existent planning strategy. Thus it did what it had to do to achieve this end and moved to amend its planning strategy and concurrently adopted a new land-use by-law to implement the amendment to the planning strategy.
>
> By virtue of section 50(2) the amendment to the planning strategy was subject to the approval of the Minister...
>
> It follows, therefore, that the land-use by-law implementing the new planning strategy was also subject to the Minister's approval by virtue of Section 59(4). It is apparent then, that what took place here was not an ordinary amendment to a land-use by-law. Instead, it was an amendment to the ...planning strategy with concurrent action to implement the amendment of the planning strategy by amending the previously existing land-use by-law...".

Hall J.C.C., in effect, decreed that there were two types of land use by-law amendment decisions which councils could make. The type of decision he described in Veinott [1] (which is like the type of decision found in this appeal) which he found could not be appealed to the Board, and the type of decision of council which is a "simple" land-use by-law amendment decision (without accompanying amendment to the MPS) capable of being appealed to the Board under Section 63 of the Planning Act.

The Board has perused the statutory citations contained in Judge Hall's decision and reread the Planning Act and is unable to follow the Learned Judge's reasoning in at least two respects:

1. That there are two types of land-use by-law amendment contemplated by the Planning Act. He arrives at this conclusion by reading Sections 50 and 51 together as being the procedure to be followed by the non-appealable type of land-use by-law amendment. The Board feels that, on a proper reading, Section 50 deals with amendments to an MPS. Also on a proper reading, Section 51 deals with a land-use by-law being adopted with an MPS. The Board holds the opinion that Section 51 refers to Section 43 and has no direct bearing upon Section 50 and vice-versa.

2. As Judge Hall states, what has occured is a land-use by-law amendment in any event and, in the view of the Board, Section 63 of the Planning Act, uncontradicted by any other section of that Act, makes the amendment decision appealable to the Board. In the view of the Board the only land-use by-laws that are not appealable to the Board are those adopted at the time of the passage of the original MPS and perhaps when the M.P.S. is being replaced under Section 50(1) of the Planning Act. There is no question of there having been a replacement under the facts of Veinott [1]

or under the facts of the present appeal.

One might also note that the decision under Veinott [1] requires Ministerial approval of the land-use by-law amendment. In the present appeal Mr. Cragg informed the Board that the Minister has not, as is his practice respecting land-use by-law amendments forwarded to him by the Municipality, approved the land-use by-law amendment in question. Mr. Cragg then went on to say that if ministerial approval were necessary here then the Municipality was free still to ask for same and the Minister was still free to grant the approval.

The Board concludes that either the decision in Veinott [1] is wrong or the just cited Ministerial practice is wrong. If the Board has any latitude to choose, the Board prefers the Ministerial practice as being correct.

As stated before, this Board feels itself bound to adopt the utmost degree of deference in considering the principles set out in Veinott [1] because of the senior status of the tribunal which decided Veinott [1]. Having stated its views as clearly as it might, the Board takes note of the similarity between the salient facts of this appeal and the salient fact of Veinott [1]. The essence of the issue in both cases is whether the Board can hear an appeal when a land-use by-law amendment is passed concurrently with a supporting MPS amendment. The Board also notes the superior status and authority of Hall, J.C.C. acting as he was in the course of his jurisdiction as a Local

Judge of the Supreme Court, Trial Division, and the clarity of his ruling. Having so taken note, the Board holds itself bound to follow its own interpretation of the Planning Act.

Counsel for Hardman has urged the Board to distinguish Veinott [1] from the present appeal on the facts. In Veinott [1] there was Ministerial approval of the amendment in the land-use by-law: in the present appeal there is no such approval. At any moment the Minister could correct that defect, if defect it is, and thus correct this factual discrepancy. In any event it is the view of the Board that Ministerial approval of the amendment in the land-use by-law is not a necessary link in the chain of events leading to the successful imposition of an amendment in the land-use by-law. The Board therefore finds itself unable to distinguish the present appeal from Veinott [1] because of any differences in their respective facts.

At page 2 of his post-hearing memorandum, counsel for Hardman then urges that the Board is not bound to follow the principles found in Veinott [1] with these words:

> "In his treatise Precedent in English Law Rupert Cross refers to Salmond's Jurisprudence and states:
>
> ...(Salmond suggests) that it is just arguable that a County Court Judge is not bound by the decision of a Judge of the High Court because Appeals from the County Court go to the Court of Appeal. The argument assumes that, strictly speaking, a lower Court is only obliged to follow the decisions of a Court above it when its own decisions can be taken to that Court.
>
> Prior to Veinott and O'Hara, (the Veinott [1] of this appeal) as in the instant case, the Minister

> of Municipal Affairs did not approve amendments to the Land-Use By-laws for the Municipality of the County of Halfiax. This practice appears to have been based on the Municipality's correct interpretation of the Planning Act and what it considered to be the mandate of the Municipal Board under the provisions of the Municipal Board Act."

This somewhat hesitant authority is based on the practice in a unitary state. Its authority should be strengthened when applied in our federal state where there is a common practice of courts of an inferior level refusing to follow courts of a superior level in another province.

In any event the Board holds that, after exercising all possible deference in its deliberations, it is unable to consider itself bound by the principles formulated by Judge Hall in Veinott [1]. Not being so bound, the Board for the reasons stated above finds that the land-use by-law amendment complained is appealable to this Board.

Since the hearing to date of this appeal merely dealt with the jurisdictional aspects of the appeal, this decision permits the Appellant to have its appeal heard on the merits. The Board will reconvene the hearing to hear the appeal on the merits.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 16th day of January, A.D., 1987.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

Sauveur v. Town of Amherst

PLANNING--ZONING AMENDMENT--APPROVAL TO REZONE Y.M.C.A. LANDS FROM R-2 AND C1-B TO 02-B--WHETHER AGGRIEVED PERSONS--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--EFFECT OF S. 60(5) ON WHETHER BY-LAW "IN FORCE"--PLANNING ACT, SS. 2(d), 53(1), 60(5), 63(1),(2),(3),(4)--TOWN OF AMHERST MPS, POLICIES 6.1.7, 6.4.1,6, 7.2.1

This is an appeal by several residents as aggrieved persons from a decision of the Council of the Town of Amherst to rezone 1.475 acres of land of the Y.M.C.A. from Medium Density Residential (R-2) Zone and Downtown Outer Commercial (C1-B) Zone to Special Use-Multi-Purpose Recreational Facility (02-B) Zone. The Town Council in one motion had created a new 02-B Zone and approved an amendment to the zoning map rezoning the Y.M.C.A. lands to the 02-B Zone. The Board with the consent of the Town and the Y.M.C.A. heard evidence at the same time on the status of the Appellants as aggrieved persons and on the merits of the appeal.

HELD: The Board dismisses the appeal and confirms the decision of Council.

It is the responsibility of the Appellants to prove they are "aggrieved" persons within the meaning of s.63(1)(a) of the Planning Act in order to give them legal status to appeal. The only Appellant to testify was D.S. Not having heard evidence as to the status of the other Appellants, it must be presumed they do not have the status of aggrieved persons. Mr. & Mrs. S. are aggrieved, not simply because their property abuts the site, but because this development when constructed and operational could reasonably be said to have some adverse or negative effect on their property resulting in some injury or devaluation.

The Board agrees that the creation of a new 02-B zone and the rezoning of the Y.M.C.A. property to that zone are consistent with the policies of the M.P.S. In this regard the Board accepts the evidence of the Planner and the Director of Planning of the Cumberland District Planning Commission, who have carefully addressed all the planning issues relevant to this appeal.

The decision of Council to amend the text of the Land-Use By-law did not come into force by virtue of s.60(5) of the Planning Act until the appeal period had expired or any appeal had been disposed of. Since there was no appeal from Council's decision to create an 02-B zone, this amendment did not come "into force" until 21 days after the advertisement in a newspaper by the Town of the Notice of the passing of the by-law (the appeal period). Since this by-law was not in force, it is questionable whether the Council could, at the time it acted, validly make an amendment rezoning the Y.M.C.A. property to the new zone. The proper procedure for Council in this matter was to firstly pass an amendment creating a new 02-B Zone. Then, after this amendment came "into force", it could have validly and effectively rezoned the Y.M.C.A. lands to the O2-B Zone. Although the Board has some doubts as to whether Council properly succeeded in rezoning the Y.M.C.A. property, it has no alternative based on its options available under s.63(4) of the Planning Act but to confirm Council's decision. The Board makes the assumption it has no power or authority to declare a municipal by-law legally invalid and must assume the validity of the by-law in question.

NSMB-531-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **DONALD SAUVEUR, ELIZABETH SAUVEUR et al** from the decision of the Council of the Town of Amherst made May 21, 1986, to amend the Town's Land-Use By-law by rezoning land situate at No. 92 Church Street in the Town from Medium Density Residential (R-2) Zone and Downtown Outer Commercial (C1-B) Zone to Special Use - Multi-Purpose Recreational Facility (O2-B) Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: The Appellants appeared without Counsel represented by the Appellant **DONALD SAUVEUR**;

BRIAN S. CREIGHTON, LL.B., for the Town of Amherst;

MICHELLE TARNEY TAJ, LL.B., for the owner, the Y.M.C.A.

DECISION

This is an appeal pursuant to Section 63 s.s. (1)(a) of the Planning Act, S.N.S. 1983, Chapter 9, by **J.R. McNair** of 17 Robie Street; **J. Ritchie** and **Lila Milner** of 9 Robie Street; **John and Marion Perry** of 8 Robie Street; **Mr. and Mrs. William Mee** of 57 Havelock Street; **Mrs. Betty Jardine** of 13 Robie Street; **Mr. and Mrs. John Nicholson** of 52 Havelock Street; **Mrs. Dorothy Fage** of 52 Havelock Street; **Peter and Cathy Smith** of 1 Blois Avenue; **Mrs. Marion Baxter** of 3 Blois Avenue; **Gordon and Sheila Wheaton** of 15 Robie Street; **Marc and Edna Fagan** of 54 Havelock Street; and **Donald and Elizabeth Sauveur** of 10 Robie Street, (all in the Town of Amherst) as aggrieved persons, from the decision of the Council of the Town of Amherst (hereinafter called the Council) made on May 21, 1986, to amend the Town's Land-Use By-law by rezoning lands owned by the Y.M.C.A. situate at No. 92 Church Street and shown on a plan of survey, subdivision and consolidation prepared by Walter C. Rayworth, N.S.L.S. dated March 12, 1986, from Medium Density Residential (R-2) Zone and Downtown Outer Commercial (C1-B) Zone to Special Use - Multi-Purpose Recreational Facility (O2-B) Zone.

The Appellants' Notice of Appeal filed as Exhibit A-1 is dated June 9, 1986, and was received by the Board on June 12, 1986. At the request of the Board the Appellants filed an Amended Notice of Appeal (Exhibit A-2) which is dated June 17, 1986, and which was received by the Board on June 23, 1986. Both the original Notice of Appeal and the Amended Notice of Appeal refer to the Council's decision of May 21, 1986, rezoning land "from R-2 and C1-B to O2 which is to allow the construction of a Y.M.C.A. Community Centre" (Emphasis Added). This reference to O2 Zone is in error but is not fatal to the appeal. It should have read "O2-B". The mistake is understandable as the Y.M.C.A. had originally applied for approval of its lands to the O2 Zone.

The hearing of the appeal took place in the Town's Council Chambers on November 18th and 19th, 1986.

Notice of Hearing was advertised in the Amherst Daily News by three insertions which appeared on October 30th, November 6th and November 13th, 1986. Copies of the Notice of Hearing published in the Amherst Daily News were filed as Exhibits A-3, A-4 and A-5.

Donald Sauveur, one of the Appellants, conducted the appeal on behalf of the Appellants. He satisfied the Board that he had arranged for service of the Notice of Hearing at least two weeks prior to the hearing on those persons specified in a letter dated October 20, 1986, sent to Mr. and Mrs. Sauveur by the Clerk of the Board.

The Board, being satisfied that the Notice of Appeal had been filed within the 21-day appeal period set out in Section 63 s.s. (2) of the Planning Act, S.N.S. 1983, Chapter 9, and that Notice of the Hearing had been properly given, proceeded to hear evidence relating to the status of any or all of the Appellants as aggrieved persons within the meaning of Section 63 s.s. (1)(a) of the Planning Act. The Board also with the consent of Counsel for the Town and Counsel for the Y.M.C.A. proceeded at the same time to hear evidence on the merits of the appeal. The Board indicated it would render one decision which would address the issue of whether all or any of the Appellants were aggrieved and if any of them had such status, the Board would determine pursuant to Section 63 s.s. (3) of the Planning Act "whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy" hereinafter referred to as the M.P.S. and then make a decision under s.s. (4) of Section 63 of the Planning Act which authorizes the Board to either:

> "(a) confirm the decision of the Council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the Land-Use By-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board".

The grounds of appeal set forth in the Appellants' Notice of Appeal are as follows:

> "1. We feel that the rezoning of this land does not conform with the Municipal Planning Strategy, i.e. Policy 7.2.1.
>
> 2. We feel our properties would be devalued.
>
> 3. We feel our rights to privacy and quiet enjoyment of property would be lost.
>
> 4. Adequate parking has not been provided.
>
> 5. We feel our residential neighbourhood could not withstand the additional vehicular and pedestrian traffic problems created by such a large multi-purpose building."

In order for the Board to make a determination on the question of whether or not the Council's decision reasonably meets the intent of the Town's M.P.S. the Board must have jurisdiction to deal with this question. It is the responsibility of the Appellants to prove that they are "aggrieved" persons within the meaning of Section 63(1)(a) of the Planning Act, in order to give them the legal status of appealing the Council's decision amending the Land-Use By-law. The only Appellant to testify was Donald Sauveur. The other Appellants having failed to testify as to their status as aggrieved persons and not having evidence from other persons as to their status it must be presumed by the Board therefore that the Appellants other than Donald Sauveur and his Wife do not have the status of aggrieved persons.

Donald Sauveur testified that he and his Wife Elizabeth have resided at 10 Robie Street in the Town of Amherst for the past 10 years. They jointly own this property which is located on the west side of Robie Street about 300' north of Church Street. The property is approximately 50' x 165' in size and its rear boundary abuts the subject property. The Sauveur property and the subject property are shown on a plan entitled "Plan of Survey Subdivision & Consolidation, Properties to be Part of or Adjacent to Lands of the Amherst Y.M.C.A., Church Street, Amherst, Nova Scotia" prepared by Walter C. Rayworth, N.S.L.S. and certified by him on March 12, 1986 and filed as Exhibit A-9. This plan shows the subject property as comprising parcels "A", "B", "C", "D", "E" and "H". Only parcel "H" has frontage on a public street. It is 98' wide and lies on the north side of Church Street. The subject site containing 1.475 acres lies within the block bounded on the south by Church Street, on the east by Robie Street, on the north by Havelock Street and on the west by Arthur Street. Parcels "A", "B", "C", "D" and "E" are all interior lots.

Mr. Sauveur stated that he considers himself aggrieved by the proposed development of the subject property for Y.M.C.A. purposes. He stated that he already experiences noise pollution from the Knights of Columbus property located on the east side of Robie Street directly opposite his property. He was of the opinion that the privacy and quiet enjoyment of his property would be lost. He was of the opinion that there was an insufficient provision for parking on the subject site which will cause problems for him from the overflow of vehicles. He pointed out that the proposed parking lot would have only one entrance and exit. He said it is presently difficult to gain entrance to his own driveway at times and this difficulty would be increased if the proposed Y.M.C.A. development was constructed. He expressed his opinion that he presently values his own property at $60,000.00 and if the Y.M.C.A. property is developed as proposed his property will be devalued by $10,000.00. He indicated he had consulted with a realtor by the name of Ross Bragg who had informed him that his property would be devalued. He also expressed the opinion that if the Y.M.C.A. proposal was implemented, he would be deprived of his rights under the Charter of Rights to enjoy his own property. He expressed the view that a

10' high brick wall along his rear boundary would help to preserve his privacy and act as a buffer between his property and the proposed development.

From the evidence of Mr. Sauveur the Board has no difficulty in concluding that he and his Wife are aggrieved persons within the meaning of Section 63 s.s.(1)(a) of the Planning Act. Mr. and Mrs. Sauveur are aggrieved not simply because their property abuts the site of the proposed Y.M.C.A. development, but because this development when it is constructed and is operational could reasonably be said to have some adverse or negative effect on their property resulting in some injury or devaluation of their property. Mr. Ross Bragg, a real estate broker for the past 8 years was called by Counsel for the Town. He gave evidence that he had carried out a free property evaluation of the Sauveur property and had estimated its value to be between $48,000.00 to $50,000.00. He said he had advised Mr. Sauveur that the construction of the Y.M.C.A. "might" affect his property value. He said the construction of the Y.M.C.A. would not likely increase the value of the Sauveur property and he declined to place a value on the effect of the Y.M.C.A. development on the Sauveur property. He did say that a playground on the subject property adjacent to the Sauveur property would result in a loss in value to the Sauveur property and would likely affect its saleability and therefore its value.

On cross-examination Mr. Sauveur was asked if he would be bothered by the construction of an apartment house building on the subject site which is an allowable use under the Medium Density Residential (R-2) Zone in effect for a portion of the subject property prior to the Council's decision under appeal. Mr. Sauveur responded that an apartment building with balconies would be worse.

Mr. Sauveur's evidence was the only evidence adduced on behalf of the Appellants.

The next witness to testify was Richard Creamer, the Executive Director of the Amherst Y.M C.A. called by Counsel for the Y.M.C.A. He gave a history of the Amherst Y.M.C.A. He stated that the present facilities of the Y.M.C.A. are located on Havelock Street in an old renovated Church property which is inadequate to carry out the work of the Y.M.C.A. He said that in the late 1970's the need for a new facility with an indoor pool became clear. Currently the Y.M.C.A. uses a pool situate at Mount Allison University in Sackville, New Brunswick, and the allotted pool time has been cut to 2 hours per week on Saturday afternoon.

Mr. Creamer stated that the focal point of the proposed new facility will be the aquatic activities. There will also be crafts, physical fitness, family oriented activities, a teen centre, racquet ball and weight room facilities. The building is designed to be totally accessible to the handicapped.

Mr. Creamer stated that the Y.M.C.A. enforces a no loitering policy around the outside of its building and the use of alcohol is strictly prohibited on the premises. He said that there are three schools within a 5-minute walk of the site and another school within a 10-minute walk. The Y.M.C.A. facility would provide an alternative to students at noon rather than walking the streets. He also said the pool would likely be used for recreational and instructional purposes during school class times. He said the proposed building would have 24,000 sq. ft. of floor space compared to 2,500 sq. ft. in the present Y.M.C.A. building.

The next witness was Alan [illegible] called by Counsel for the Y.M.C.A. He is a resident of Amherst and is employed as an engineer with Robb Engineering. He is involved in minor sports. He is a member of the Y.M.C.A. Facilities Committee which investigated the possibility of building a new Y.M.C.A. facility. His personal interest is with youth and the lack of facilities for his own children and other children in the community. He identified Exhibit A-15 as the Amherst Y.M.C.A.'s criteria for site selection. He stated that the subject site fits these criteria better than any other site in the Town. These criteria are:

"Availability
Accessibility to Pedestrians
Accessibility to Schools
Accessibility to number of households
Accessibility to working population
Accessibility to senior citizen units
Vehicular Access
Supplementary parking
Cost
Visibility
Services
Impact on area

Leave residential units intact"

Frank Barteaux, the Superintendent of Schools for the County of Cumberland was called by Counsel for the Y.M.C.A. He said there were five schools in Amherst, three elementary, one Junior High and one Regional High School. He said that there is a shortage of recreational facilities in these schools. He said there is an agreement between the school board and the Y.M.C.A. to use the existing Y.M.C.A. facilities for recreation. He pointed out that there are no swimming facilities in the schools. He thought that the subject site was within walking distance of most of the Amherst schools and had good potential for use by students and teaching staff on lunch breaks or after school hours.

Evidence was given by Shelagh Rayworth, the President of the Amherst Y.M.C.A., a resident of Amherst since 1970 and a former Town Councillor and Deputy Mayor. She stated that the Town is lacking in recreational facilities. She said that tax dollars could not erect and support an aquatic facility wanted by the general public. She referred to two surveys conducted by the Y.M.C.A. indicating that 90% of the persons who completed the survey supported the building of a gym and indoor pool for the community. She said that the Town had conducted a plebiscite concerning the proposed facility which approved the proposal and agreed to have a special tax assessed to help fund the capital cost of the facility estimated at $2.6 million.

Mrs. Rayworth said that the Y.M.C.A. was aware of the concerns of residents in the vicinity of the subject site and tried to address all these concerns. She said that the Y.M.C.A. held a public hearing and invited the neighbourhood residents to express their concerns. She said that the Y.M.C.A. acquired the subject site by purchasing separately various properties and then consolidated these properties into one parcel of land. Application was then made to rezone the site to the Special Use (O2) Zone which was a satisfactory zone from the point of view of the Y.M.C.A. She said that Council decided to establish a new O2-B zone and rezoned the subject site to the new zone which she thought imposed additional obligations on the Y.M.C.A. over the O2 Zone to meet the concerns of area residents.

Expert testimony was given by Drew Sperry of Dartmouth, a professional architect and planner who specializes in sports and recreational facilities. He stated that provision has been made for 66 parking spaces on the subject site which he considered more than adequate. He said that one reason for selecting a downtown site for the Y.M.C.A. is that most of the traffic to the site will be on foot. Mr. Sperry stated that the design of the proposed building was made to blend in and be compatible with the adjacent residential properties.

Mr. Sperry said that he had designed the proposed building so that its lowest portion would be on the eastern end of the site next to the property of Marion Baxter shown as house No. 3 on the plan filed as Exhibit A-9. This portion of the building would approximate the height of the Baxter house and would have a pitched roof similar in shape to the Baxter house and the house to its east so that the Y.M.C.A. building would blend in with the adjacent residential properties. He pointed out that the highest portion of the subject building would be on the western end of the building where the gym was located and where it would be compatible with the commercial properties to the west of the subject site. He also said that the proposed building was designed with no windows overlooking the adjacent residential properties in order to address the concern of some residential property owners that they would lose their privacy. A conceptual architectural drawing prepared by Mr. Sperry's firm filed as Exhibit A-13 shows the proposed building from four different vantage points and illustrates Mr. Sperry's efforts to design a building compatible with the adjacent residential properties.

Fred Haines, the Clerk-Treasurer of the Town since January of 1985, was called by Counsel for the Town. He identified Exhibit A-10 as being all of the Town's amendments to the Land-use By-law for the period 1985 - 1986. He also identified Exhibit A-17 as the Town's Zoning Atlas which goes with the Land-Use By-law. He said that the subject property is shown on Map No. 3 of Exhibit A-17.

Mr. Haines also identified and briefly referred to the following Exhibits viz:

A-18 - Minutes of a meeting of the P.A.C. of the Town held February 18, 1986.

A-19 - Report to the Mainstreet Committee of the Town dated February, 1985, prepared by the Cumberland District Planning Commission entitled "A Comparison of the Relative Accessibility of Three Sites Proposed for the New Amherst Y.M.C.A.".

A-20 - Report dated February 24, 1986, from Rick McCready, Planner, to the Mayor and Council of the Town re the proposed Y.M.C.A.

A-21 - Letter from Mr. and Mrs. Donald Sauveur dated March 10, 1986, addressed to the Town Council objecting to the proposed location of the Y.M.C.A. building.

A-22 - Minutes of an informal public meeting held by the Town Council on February 28, 1986, "to obtain input from interested persons on the possibility of amending the Town of Amherst's Municipal Planning Strategy to facilitate the construction of a new Y.M.C.A. ...".

A-23 - Minutes of a P.A.C. meeting held March 3, 1986.

A-24 - Application by Y.M.C.A. dated March 11, 1986, to rezone subject site to O2 (Special) use Zone.

A-25 - Minutes of a P.A.C. meeting held March 12, 1986.

A-26 - Report to Council dated April 3, 1986, from Rick McCready, planner.

A-27 - Minutes of a P.A.C. meeting held April

4, 1986.

A-28 - Report to Council from the P.A.C. dated April 21, 1986.

A-29 - Extracts from the minutes of a Council meeting held April 21, 1986.

A-30 - page 9 of the Amherst Daily News April 28, 1986, which has a Notice of Proposed Amendments to the Town's Land-Use By-law; (1) creating a new zone, to be known as the Special Use - Multi-Purpose Recreational Facility (O2-B) Zone and (2) amending the Zoning Map by rezoning the Y.M.C.A. property on Church Street to O2-B Zone.

A-31 - Page 16 of the Amherst Daily News May 12, 1986, containing a Notice of proposed Amendments to the land-Use By-law.

A-32 - Letter to the Council dated May 7, 1986, from Mona B. Cameron.

A-33 - Letter to the Council from John and Barbara Nicholson of 52 Havelock Street.

A-34 - Letter to the Council dated May 19, 1986, from a number of residents of Havelock, Robie and Blois Avenue, including Mr. and Mrs. Sauveur.

A-35 - Letter dated May 20, 1986, from the President of the Y.M.C.A. to area residents.

A-36 - Letter dated May 13, 1986, from Jens Jensen, Executive Director of the Cumberland District Planning Commission to the Town pointing out that the architect's plan uses parking spaces of about 9' x 18' whereas "the Town's land use bylaw specifies a size of 3 meters by 6 meters".

A-37 - Church Street Traffic Analysis dated May 21, 1986, prepared by Town Engineer.

A-38 - Minutes of Council meeting held May 21, 1986.

A-39 - Page 11 of the Amherst Daily News of May 26, 1986, which contains inter alia a Notice that the Council on May 21, 1986, approved amendments to the land-use by-law (1) creating a new O2-B Zone and (2) rezoning the Y.M.C.A. site to (O2-B) Zone.

A-40 - Copy of an unsigned Statutory Declaration by Fred W. Haines dated May 26, 1986, respecting the amendment of the Town's Land-Use By-law approved by the Town on May 21, 1986.

Richard McCready, a planner employed by the Cumberland District Planning Commission was called by Counsel for the Town to give expert planning testimony. Mr. McCready holds a degree in Urban & Rural Planning from the Technical University of Nova Scotia and is a member of the Canadian Institute of Planners. He identified Exhibit A-20 as his memo to the Council dated February 24, 1986, respecting the proposed Y.M.C.A. facility. He had been involved from the beginning with the Y.M.C.A.'s application.

Mr. McCready stated that at first there appeared to be two problems referred to in his February 24, 1986, memo (Exhibit A-20) as follows:

> "A detailed site plan of the project was not submitted with the application and a full staff review cannot be completed until such a site plan is produced. However, based on the information now available, there appear to be two major problems:
>
> (a) Although the M.P.S. (Policy 6.4.1) provides Council with the option of rezoning lands anywhere in Town to the O2 Zone, Y representatives have indicated that their building will be approximately 26,000 sq. ft. in size; this would mean that approximately 80 parking spaces would be needed. It is not possible to provide that amount of parking on the land they own (or expect to own) and there is no provision in the MPS to waive parking requirements in the O2 Zone.
>
> A solution to this dilemma is for the Y to purchase additional land to meet the parking requirements. If this involves the purchase of more R-2 zoned lands and the demolition of existing houses the impact on the nearby residential areas should be addressed.
>
> (b) The proposed Y would be a permitted use in the C1-B Zone, and therefore if the project were entirely within that zone (in other words, did not overlap into R-2) approval could be much easier. If the Y were to revise their plans so that their project was confined to areas zoned C1-B, Policy 2.4.3 of the MPS might be utilized to waive or make special arrangements for the parking requirements under a development agreement. For example, arrangements to provide the required parking on the Blanche lot even though it is not owned by the Town or the Y might be possible".

Mr. McCready reviewed in detail his planning report to the Council dated April 3, 1986, (Exhibit A-26) in which he recommends that the Council create a new zone category entitled "Special Use - Multi-purpose Recreational Facility (O2-B) Zone" and that the Y.M.C.A. property be rezoned to O2-B Zone. The following is the text of his report (without the appendices):

A-26

Cumberland
District Planning Commission
Box 549, Amherst, Nova Scotia B4H 3Y6
(902) 667-5141

3 April, 1986

TO: Mayor and Council
Town of Amherst

FROM: Rick McCready, Planner
Cumberland District Planning Commission

RE: Proposed Rezoning of YMCA lands from R-2 and C1-B to 02
(CASE NO. LUBA-86-07)

1. Overview

1.1 The Application

This report concerns an application dated March 11th, 1986 by Richard G. Creamer, Executive Director of the Amherst YMCA to:

- rezone parcels "A", "B" and "C" on the attached Appendix A from the Medium Density Residential (R-2) Zone to the Special Use (02) Zone.
- rezone parcels "D", "E" and "H" on the attached Appendix A from the Downtown-Outer Commercial (C1-B) Zone to the Special Use (02) Zone.

All of the above noted lands have been acquired by the Amherst YMCA and a plan of subdivision to consolidate all of these parcels into a single lot is now before Mr. Don Carr, the Town's Development Officer, awaiting his approval. The proposed rezoning would put the entire Y property within the 02 Zone.

The Y proposes to erect a structure approximately 23,400 sq.ft. in area on the site which would house a new multi-purpose recreational facility including a pool, gym, multi-purpose room (bingo hall), weight room and racquetball court. Such a facility would be a permitted use in the C1-B Zone, and had it been possible for the structure together with all accessory uses (parking lots, outbuildings, outdoor recreational uses) to be located entirely within the bounds of that zone no rezoning would be required. It does not, however, appear to be possible (or even desirable) from the Y's point of view to restrict the development to the area now zoned C1 -B.

The alternative of applying only to rezone to 02 those areas now R-2 was considered, but due to possible confusion regarding yard requirements (these requirements are not the same in a 02 Zone as in a C1-B Zone) and other matters it was decided to proceed with an application to rezone the entire area to 02.

1.2 Site Description

Parcels "A", "B" and "C" on the attached sketch have until acquisition by the YMCA formed the rear portions of the backyards of residential properties on Havelock Street; they contain no structures. Parcels "D" and "E" were owned by Bobmar Holdings Ltd. (owners of a commercial building fronting on Church St.) and contain no structures other than an obsolete storage shed which presumably will be demolished. Parcel "H" is the former site of a convent but has been vacant for several years.

The new lot to be created will be generally bounded on the east and south by residential properties on Havelock, Robie and Church Streets and on Blois Avenue, the latter being a private lane rather than a town street. In all the site will directly abut six residential uses; one, the house belonging to Marion Baxter on Blois Avenue, will be less than 6 ft. from the property line; all other houses will be considerably further. The site is bounded on the west by commercial properties (Rent-A-Wreck, Fundy Carpet, the Dairy Queen) and on the north by a large paved parking lot (112 spaces) which is privately-owned but available for public use because of an agreement between the owner (Amherst Central Charge Ltd.) and the Town of Amherst.

2. Conformance with MPS Policies

The enabling policy for this rezoning is Policy 6.4.1, a copy of which is attached to this report as Appendix B. This policy is written so as to allow Council to consider rezonings to the 02 Zone to allow institutional or non-profit activities (churches, schools, YMCAs, etc.) to locate anywhere in the Town. The policy does specify that Council must have regard to the various requirements of Policy 7.2.1 (the checklist governing all zoning amendments) in making its decision.

I have reviewed the checklist in Policy 7.2.1 and bring the following information to Council's attention. For the sake of clarity, the excerpts from Policy 7.2.1 itself are capitalized and underlined, my comments are not.

> POLICY 7.2.1
>
> IN CONSIDERING AMENDMENTS TO THE LAND USE BYLAW, IN ADDITION TO ALL OTHER CRITERIA AS SET OUT IN VARIOUS POLICIES OF THIS PLAN, COUNCIL SHALL HAVE REGARD TO THE FOLLOWING MATTERS:
>
> (A) THAT THE PROPOSAL IS IN CONFORMITY WITH THE INTENT OF THIS PLAN AND WITH THE REQUIREMENTS OF ALL OTHER MUNICIPAL BYLAWS AND REGULATIONS.

This proposal would appear to conform to the intent of this Plan which is to permit (subject to a rezoning) the construction of "special uses" such as schools, churches and community centres anywhere in Town, including residentially zoned areas. This contrasts with the fact that the MPS has no provision to allow lands designated as "Predominantly Residential" to be rezoned to a commercial or industrial zone. In other words, those lands owned by the Y which are now zoned R-2 are eligible to be considered for a rezoning to the Special Use (02) Zone, but could not be rezoned to C1-B (or any other commercial zone) under any circumstances. Should the application before Council be for a large commercial complex rather than for a YMCA, Council would have no option other than rejecting the proposal or amending the policies of the MPS.

Evidence that this particular application conforms to the intent of the Plan is found in the section dealing with parks and recreational facilities where Policy 6.1.7 states that "it shall be the intention of Council to support efforts to construct an indoor aquatic facility in the Town of Amherst". (p. 71) Although such a statement certainly does not in my opinion obligate Council to approve this rezoning, it does indicate that Council generally supports such a development and will look favourably on a rezoning to facilitate it providing, of course, that other planning concerns are adequately dealt with.

There appears to be no conflict with any other municipal bylaw or regulations (i.e. the Subdivision Bylaw, Heritage Property Bylaw, etc.) which would result from this rezoning.

(B) THAT THE PROPOSAL IS NOT PREMATURE OR INAPPROPRIATE BY REASON OF:

(i) THE FINANCIAL CAPABILITY OF THE TOWN TO ABSORB ANY COSTS RELATING TO THE DEVELOPMENT;

Off-site costs related to the development such as water, sewer or road work will not be required and as a result the Town shall bear no responsibility in that regard.

The actual on-site construction cost of the facility and ancillary activities (expected to total about $2.4 million) will be shared by the Town to the tune of $500,000. The Town's financial participation in the project was the subject of a plebiscite in September of 1985 at which the electorate approved the implementation of a surtax on property tax bills which, over a three-year period, would provide the Town's contribution to the project. The enabling legislation (Bill 25) for this endeavour was at the time of writing before the provincial government for its consideration.

The question that arises in considering the rezoning application at hand is whether or not it is "premature or inappropriate" by reason of the capability of the Town to absorb any related costs. As Council chose to put the matter before the voting public and because the public approved the expenditure, it would seem reasonable to assume that in fact the proposal is not "premature or inappropriate". There may, however, be legal or budgetary questions which are beyond the scope of this report that Council may wish to consider. I am not prepared to advise in this regard and suggest that if there is uncertainty on this point the advice of the Town Solicitor be sought.

(ii) THE ADEQUACY OF SEWER AND WATER SERVICES AND UTILITIES OR IF SERVICES ARE NOT PROVIDED, THE ADEQUACY OF PHYSICAL SITE CONSIDERATIONS FOR PRIVATE ON-SITE SEWER AND WATER SYSTEMS;

Any development in a O2 Zone must be served by central water and sewer services, and a new YMCA on the site in question will obviously have to be connected to those services. I would foresee no problem in this regard as the building can be hooked up to the existing mains on Church Street the capacity of which should be more than adequate.

(iii) PRECIPITATING OR CONTRIBUTING TO A POLLUTION PROBLEM IN THE AREA;

To the best of my knowledge, there is no pollution problem in this area which could be aggravated by this proposal, and it appears unlikely that such problems would be created.

(iv) THE ADEQUACY OF STORM DRAINAGE AND THE EFFECT OF SAME ON ADJACENT USES;

Storm drainage from the site should not cause any problems although it should be noted that the facility will contain a 25 m. pool, the water in which will have to be disposed of on a regular basis, presumably into the storm sewer.

There is a 30" storm sewer on Church Street into which water from the pool can drain. This should be adequate.

(v) THE ADEQUACY AND PROXIMITY OF SCHOOL, RECREATION, AND ANY OTHER COMMUNITY FACILITIES;

In my opinion, this clause was intended for use primarily when Council has under consideration a proposal for a residential development, particularly one which involves a rezoning to increase the maximum population density on a site. It would therefore appear to be irrelevant in this case.

Should it be felt by Council that the issue of proximity to schools is in fact relevant to this case, it must be said that the proposed site is actually very well located. Of the Town's six schools, four are within easy walking distance[1].

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[1] Cumberland District Planning Commission A Comparison of the Relative Accessibility of Three Sites Proposed for the New Amherst YMCA, February, 1985.

(vi) THE ADEQUACY OF ROAD NETWORKS, IN, ADJACENT TO, OR LEADING TO THE PROPOSED DEVELOPMENT;

It is proposed that vehicular access to the site will be provided only via Church Street. As Church Street is an arterial street (it is in fact one of the Town's main streets) it should be adequate to handle any increase in traffic volumes brought about by the new YMCA. (these matters are dealt with in more detail later in the report)

(vii) THE POTENTIAL FOR CONTAMINATION OF WATERCOURSES OR THE CREATION OF EROSION OR SEDIMENTATION;

No watercourses are located in the vicinity of this site; the potential for erosion or sedimentation problems is very minimal.

(c) THAT CONSIDERATION BE GIVEN TO THE EXTENT TO WHICH THE PROPOSED DEVELOPMENT MIGHT CONFLICT WITH ANY ADJACENT OR NEARBY LAND USES BY REASON OF:

(i) TYPE OF USE;

The new YMCA will function as a community centre for the entire Amherst area and will be the focus of not only recreational but social activities as well. The scale of the proposed building (23,400 sq.ft.) indicates that it will most certainly exert an impact on the surrounding area, especially when one considers that at the present time the site is almost completely vacant.

In considering the impact of this rezoning in terms of "type of use" it must be borne in mind that well over one half of the land to be occupied by the new YMCA is now zoned C1-B. The C1-B Zone (see Appendix C) permits a very wide variety of commercial, residential and institutional uses, including such intensive uses as restaurants, lounges and commercial recreation centres (bingo halls, video arcades, etc.). In other words, intensive commercial activities could develop as of right (without a rezoning) on the site owned by the Y; they would, of course, be limited to those lands zoned C1-B and could not encroach into the R-2 zoned areas. If the new YMCA were a somewhat smaller project, a rezoning could probably have been avoided as it would have been possible to limit the development to the C1-B Zone.

The rezoning of the entire YMCA property to O2 could conceivably benefit the adjacent residents on Church, Robie and Havelock Streets in that it would ensure that the lands zoned C1-B are developed for a YMCA rather than one or more of the other uses possible under C1-B zoning, many of which could exert a far more negative impact in terms of hours of operation, litter generation, and noise than would the YMCA.

Based on the above, it can be surmised that the concern over the "type of use" in this case is somewhat of a "red herring". The type of use involved will exert no more impact (and quite possibly less) than uses permitted as-of-right in the C1-B Zone on most of the subject property. A more relevant issue is the proximity to the adjacent residential uses.

(ii) HEIGHT, BULK AND LOT COVERAGE OF ANY PROPOSED BUILDING;

Preliminary sketches of the proposed building (Appendix D) indicate that it will occupy more than one third of the site, and that it will be situated behind the Rent-A-Wreck building. As no architectural drawings are available for inspection, and because the YMCA has indicated that at this point they cannot say for certain how the building is to be positioned on the lot, a detailed discussion on the matters of height, bulk and lot coverage is not possible.

Council must give consideration, however, to the fact that by rezoning the subject lands to 02 they will (using present 02 Zone standards) be granting permission for the building to be built to within 4 m. or 13.1 ft. (or 1/2 of height of the building if higher than 8 m.) of the side lot lines, and to within 8 m. (26.2 ft.) of the rear lot lines. Several residential properties abut the rear lot line, and three abut the side lot line. It is the property of Mrs. Baxter on Blois Avenue that would appear to most likely suffer from proximity to the structure.

(iii) TRAFFIC GENERATION, ACCESS TO AND EGRESS FROM THE SITE, AND PARKING

The YMCA has submitted a site plan (Appendix D) which indicates that access to and egress from the site will be via Church Street only. The plan also indicates that it is possible to provide the number of spaces required by the Land Use Bylaw within the site[1]. An inspection of the layout reveals that moving the building back into the area now zoned R-2 actually has a beneficial impact in that it allows for a much larger parking area in front.

There is considerable concern on the part of area residents regarding present parking problems on Robie Street which result from activities taking place at the Knights of Columbus Hall (a non-conforming use) several evenings a week. Although these concerns might be somewhat alleviated by a strict enforcement of the parking ban on the north side of the street, it is also highly desirable that pedestrian access to the Y from Robie Street through Blois Avenue not be permitted. Such access not only results in the risk that Y users will park in the Robie Street-Blois Avenue area, but will also create a natural pathway for students from the nearby high school.

Traffic generation to and from the site was estimated using the user projections in the YMCA's own feasibility study. (Table 1) The projected additional traffic (which could be significant) should not cause any major problems if access to the site is limited to Church Street which is already a major arterial street. (it is in fact a provincial trunk highway)

---

[1] The site plan submitted by the Y (Appendix D) shows 86 parking spaces, and a letter from their architect, (Appendix E) who employs a very liberal interpretation of the parking requirements in the Land Use Bylaw, indicates that only 53 spaces are necessary. Using a more conservative interpretation of the parking requirements, I anticipate that 85 spaces will be needed.

21,400 sq.ft. @ one space per 322.9 sq.ft. (the requirement for "all other uses") = 66.3 spaces

2,000 sq.ft. @ one space per 107.6 sq.ft. (the requirement for places of assembly such as bingo halls) = 18.6 spaces

Total = 85 spaces

It therefore appears possible to meet the parking requirements although it should be noted that decisions on these matters are made by the Development Officer at the time a development permit is issued. If the Development Officer finds the final site plan is inadequate in terms of parking he cannot issue a permit regardless or whether or not the rezoning has gone through.

TABLE 1

Projected Increase in Daily Traffic Volumes Generated by the New Amherst YMCA

Approximate Present Daily Traffic Volumes on Church Street[1]	Approximate Number of Additional Vehicles Per Day[2]	Percentage Increase
4206	867	20%

---

[1] Based on a 12-hour (7 a.m. to 7 p.m.) count taken August 24th, 1982 with 50% added on to account for the 7 p.m. to 7 a.m. period.

[2] Based on the estimate contained in the YMCA Project Development Committee Report (April, 1985) which indicated that there would be 2024 regular users of the facility. Should each regular user visit the Y three times a week on average, and should each visit generate on average one vehicle movement on Church Street, (this would mean 2 persons per vehicle) 867 additional vehicle trips would be created. Of course, many individuals will go to the Y on foot or in a car with more than one other occupant; this, however, will probably be offset by those who will use the facility who are not "regular users".

In all, it would appear that traffic and parking problems should be minimal, but only if:

- no pedestrian access from the Blois-Robie area is provided;
- the floor area of the facility is not significantly greater than what is shown in the preliminary sketches; if it were, it may not be possible to provide the required parking on the site. (No development permit would be issued for construction of the building if this were the case).

(iv) OPEN STORAGE;

(v) SIGNS; AND,

(vi) ANY OTHER RELEVANT MATTER OF PLANNING CONCERN OUTLINED IN THIS STRATEGY.

In my opinion, there is relatively little cause for concern here; the YMCA is unlikely to need to be storing large amounts of material outside, or erecting large numbers of signs. There appears to be no other matters relevant to the MPS that Council should be looking at with regard to this development.

(d) THAT THE PROPOSED SITE IS SUITABLE IN TERMS OF STEEPNESS OF GRADES, SOIL AND GEOLOGICAL CONDITIONS, LOCATIONS OF WATERCOURSES, POTABLE WATER SUPPLIES, MARSHES OR BOGS AND SUSCEPTIBILITY TO FLOODING.

The site is relatively level and well-drained and would appear to have no other serious physical limitations for the use contemplated by this rezoning.

Recommendation

3. Policy 6.4.1, the enabling policy in the MPS for this rezoning, provides Council with an option which would allow them to grant approval to this rezoning with certain stipulations attached to protect the nearby R-2 properties which are being encroached upon. The policy states that Council, when considering a rezoning to 02, may simply say yes or no or may create a variation of the 02 Zone which would incorporate site specific requirements designed to minimize the development's impact on its neighbours. This approach was utilized in the past for the Cumberland County Museum (see LUB, Part 22, Special Use-Museum Zone).

Because of the potential adverse impacts of this development on the adjacent residential uses, most particularly the parking problem in the Blois-Robie Street area, I have prepared the text of a new zone category entitled Special Use - Multi-purpose Recreational Facility (02B) Zone, which could be inserted into your Land Use Bylaw as Part 22A. (Appendix F) The creation of this new Zone, as well as the rezoning of the YMCA lands to that zone, would in my opinion be consistent with the policies of your Municipal Planning Strategy and I am prepared to recommend in favour of it.

Yours very truly,

Rick McCready

Rick McCready
Planner

Policy 6.4.1 relied upon by Mr. McCready as being the enabling policy in the M.P.S. for rezoning to O2 or to the O2-B Zone states as follows:

> "It shall be the intention of Council to include in the Land Use Bylaw a 'Special Use' (O2) Zone in which a variety of institutional uses, including churches and schools, shall be permitted uses. It shall further be the intention of Council to zone existing special uses to the O2 Zone or an appropriate variation (for example, in the case of the Cumberland County Museum), thereof and to consider applications to rezone lands anywhere in the Town to the O2 Zone. It shall further be the intention of Council to have regard to Policy 7.2.1 in considering any such rezoning."

The following is the text of the (O2) Zone contained in Part 21 of the Town's Land-Use By-law:

> "O2 USES PERMITTED
>
> 1. No development permit shall be issued in a Special Use (O2) Zone except for one or more of the following uses:
>
> Any use permitted in an Open Space (O1) Zone
> Churches, places of worship and religious institutions
> Colleges, Universities and Schools
> Group Care Facilities
> Hospitals
> Libraries, Museums and Art Galleries
> Private Clubs and Fraternal Organizations such as a Lions Club or a YMCA
> Any institutional Use which is incorporated under the Societies Act R.S.N.S. 1967, Ch. 286
> Any Government Office Building, Police Station, Fire Hall, or other Public Building
> Non-residential day care centres
> Community Centres
> Funeral Homes
> Public recreational facilities such as a rink or aquatic centre
>
> O2 ZONE REQUIREMENTS
>
> 2. In a Special Use (O2) Zone, no development permit shall be issued except in conformity with

the following requirements:

Minimum Lot Area - 1000 sq. m. (10764 sq. ft.)

Minimum Lot Frontage - 20 m. (65.6 ft.)

Minimum Front Yard - 8 m. (26.2 ft.)

Minimum Rear Yard - 8 m. (26.2 ft.)

Minimum Side Yard - 4 m. (13.1 ft.) or ½ the height of the main building whichever is the greater

Maximum Height of Main Building 15 m. (49.2 ft.)

Parking - As per Part 5, Section 24"

The text of the (O2-B) Zone found in Part 22A of the Land-Use By-law reads as follows:

"O2B USES PERMITTED

1. No development permit shall be issued in a Special Use-Multi-purpose Recreational Facility (O2B) Zone except for the following:

Multi-purpose Recreational Facilities such as a YMCA

O2B REQUIREMENTS

2. O2B Zone requirements shall be the same as for the O2 Zone.

O2B SPECIAL REQUIREMENTS

3. In a O2B Zone, all parking areas shall be paved.

4. No parking areas, signs, or open storage shall be permitted in a rear or side yard in a O2B Zone which abuts a residential zone.

5. No accessory uses, structures or buildings shall be permitted in a rear yard in a O2B Zone which abuts a residential zone except for a playground or outdoor activity area for children.

> 6. In a O2B Zone, an continuous fence designed to prevent pedestrian traffic flow and a minimum of 1.5 m. in height shall be provided along any rear or side lot line which abuts a residential zone.
>
> 7. In a O2B Zone, no windows shall be provided in any main or accessory building on a side facing an abutting residential use.
>
> 8. In a O2B Zone, all areas not occupied by buildings, structures, parking areas or loading areas shall be landscaped and a minimum of one tree at least 1.5 m. (4.9 ft.) in height shall be planted or retained for every 50 sq. m. (538.2 sq. ft.) of landscaped area."

The Board has set out the complete planning report prepared by Mr. McCready (with the exception of the appendices to the report) as the report carefully addresses all of the planning issues relevant to this appeal. The Board agrees with the recommendations in the report that a new O2-B Zone be created and that the Y.M.C.A. lands be rezoned to that zone. The Board also agrees that the creation of the new zone and the rezoning of the Y.M.C.A. property to the O2-B Zone are consistent with the policies of the M.P.S.

Expert planning testimony was given by Jens Jensen, the Executive Director of the Cumberland District Planning Commission. He is a professional engineer and has been involved in municipal planning for 14 years. He is a member of the Canadian Institute of Planners. He stated that a special use zone such as the O2-B Zone is useful in integrating commercial and residential uses in a particular area. He considers it a means of integrating these two uses as well as providing a sort of buffer area between these uses. He considered that this type of integration of uses is in keeping with good planning principles. He concurs with Mr. McCready's report and recommendations. He stated also that the development agreement process, if available, would have been a preferred course of action for the Council. He was of the opinion that the proposed development complies with and meets the intent and the policies of the M.P.S.

Ronald Patterson, the Town Engineer was called by Counsel for the Town. He holds a degree in Civil Engineering and is a member of the Canadian Institute of Engineers. He stated that the construction of the proposed Y.M.C.A. facility will not overburden the existing water supply system of the Town. He said that Church Street is presently serviced by means of a 10" water main. Mr. Patterson referred to some traffic studies conducted by his department. Exhibit A-41 is a memo dated May 21, 1986, from him to the Chief of Police who is the Town of Amherst Traffic Authority. This memo after referring to sample traffic counts taken on Church Street between Robie Street and the proposed Y.M.C.A. driveway on Church Street states that "assuming 350 cars per day of new traffic we have an increased daily traffic flow of approximately 8% on Church Street in front of the site ...".

Mr. Patterson stated that in his opinion the proposed development of the Y.M.C.A. meets the requirements of Policy 7.2.1 of the M.P.S. of the Town. Policy 7.2.1 sets out certain specific matters that Council must consider in considering amendments to the Land-Use By-law. In particular he stated that water and sewer services are adequate.

At the completion of the hearing of the evidence on November 19, 1986, the Board requested the parties to file post-hearing submissions with special emphasis on the meaning to be given to the words "into force" in the context of s.s.(5) of Section 60 of the Planning Act which reads as follows:

> "(5) An amendment to a land-use by-law does not come into force until the time for appeal has elapsed or, where an appeal has been made to the Board, all appeals have been
>
> a) abandoned; or
>
> b) disposed of and the by-law has been affirmed by the Board".

It is significant that the Board informed Counsel for the Town in October of 1986 that the Board would expect to hear argument on the Town's procedure in this case in the light of S. 60(5) of the Planning Act. At the Board's request Counsel for the Town wrote to the Appellants, Mr. and Mrs. Donald Sauveur, on October 22, 1986, advising them of this concern. Copies of this letter were sent by Counsel for the Town to Counsel for the Y.M.C.A., the Town Clerk and to the Board. The following is the full text of the letter dated October 22, 1986:

"Dear Mr. and Mrs. Sauveur:

Re: Municipal Board Appeal

I am writing to you at the request of Mr. Robert Blois, Chairman of the Nova Scotia Municipal Board.

As you know, when the Amherst Town Council amended its Land Use By-law in regards to the Y.M.C.A., it did two things:

a) created a new institutional zone known as the O2B Zone;

b) it amended the zoning map such that the land in question was zoned O2B.

The question raised by Mr. Blois was whether pursuant to the Planning Act, S. 60(5), the second decision of Council was possible. He raises the question whether it would be possible for Council to amend the zoning map when that zone would not be in force until the appeal period expired.

We have had a chance to examine this on behalf of the Town and Michelle Taj has examined the matter on behalf of the Y.M.C.A. Both the Town and the Y.M.C.A. take the position that Town Council acted properly. Mr. Blois has asked that I bring this to your attention so that you may consider whether you would want to present arguments on this matter at the hearing in November.

Yours very truly,

MILNER, SHATFORD & CREIGHTON

Per:

BRIAN S. CREIGHTON"

On May 21, 1986, when the Town Council passed a motion to rezone the subject property to O2-B Zone, the Council had at the same time passed a motion to amend the text of its Land-Use By-law by the creation of the O2-B zone referred to as the Special Use - Multi-Purpose Recreational Facility Zone. If the words "does not come into force" mean "have no legal force or effect" then the Council's action in rezoning the subject site would not be effective in law until the 21-day appeal period had expired or if an appeal had been filed until the appeal had been abandoned or disposed of and "the by-law has been affirmed by the Board". The Appellants in this case did not appeal the Council's decision creating the new O2-B Zone but only appealed the Council's decision rezoning the subject property to the O2-B Zone.

Counsel for the Y.M.C.A. and Counsel for the Town filed post-hearing briefs both of which were received by the Board on December 5, 1986. Mr. and Mrs. Sauveur wrote to the Board by letter dated November 29, 1986, received on December 3, 1986 which states the following:

> "We feel the mistake the Town of Amherst made in changing the zoning map without waiting the outcome of our appeal is obvious. However, we lack the legal expertise to submit a brief on the subject."

Section 60 of the Planning Act makes provision for the amendment of a land-use by-law. Subsection (1) of Section 60 states that "a Council may by by-law amend a land-use by-law made under this Act and the provisions of this Act respecting the adoption of the by-law apply mutatis mutandis to its amendment." Subsection (5) of the section quoted above relates to the effective date of the amendment and that date is either the date when the right to appeal has expired if no appeal has been commenced or where an appeal has been commenced, after it has either been abandoned or been disposed of.

Counsel for the Town in his post-hearing brief referred the Board to the Ontario case of In Re Denison & Wright (1909) 19 O.L.R. 5 (Ont. Div. Ct.) in which Meredith, C.J. noted at page 7 that "The words 'in force' are used in various parts of the statute law of this Province, and not always, as I think, in the same sense, and the meaning to be attached to them must be gathered in each case by a consideration of the subject matter in which they relate".

Counsel for the Town quotes two further passages from Meredith C.J. in the Dennison & Wright case at page 7 as follows:

> "The by-law in question, though by its terms ... was to 'come into operation and be of full force and effect' only on and after the next first day of May, was, nevertheless an existing law of the municipality".
>
> "The words 'in force' in this Section are used, I think as meaning 'having the force of law' or as being in existence and, in my opinion, the by-law in operation had the force of law from the time of its final passing, although its prohibition did not become operative until a later date, and it certainly was an existing by-law".

Ian Rogers in his well known work entitled "The Law of Canadian Municipal Corporations" Second Edition, comments in paragraph 76.1 pages 448 - 450 on the date that a by-law comes into force as follows:

> "It is sometimes important to determine when a by-law was passed or when it became operative or came into effect. A by-law is considered as 'passed' when the final action of the council in enacting it is done although it has not been authenticated in the manner prescribed by statute(s). It is the final enactment of a by-law by the council such that no further action by it in

the nature of confirmation or ratification is required in order to make the by-law effective. The by-law must be complete in itself so that it effects the purpose for which it was intended although possibly it may not be brought into force until a later date(t). A by-law is regarded as being passed when it has received its third reading notwithstanding that the legislature has declared that something else must be done such as the securing of the approval of a municipal board before it is to 'come into force'(u). Until such act has been done, the by-law is merely ineffective and unenforceable(v). There may, however, be the exceptional case where, because of the peculiar wording of a statute, a by-law is not considered passed until such further requirement has been complied with(w).

There is a distinction between a by-law being 'in force' and a by-law 'becoming operative' or 'coming into effect'. A township by-law passed on January 25th contained a provision that it should come into operation and be in full force and effect on May 1st following. Before May 1st, a part of the township was erected into a village and the question was whether the by-law continued to apply to the village as having been previously 'in force' within the meaning of s. 17(1) of The Municipal Act. It was held that the by-law had the force of law from the time of its final passing although its prohibition did not become operative until a later date. So for a by-law to be in force, it must be existing law and all the formalities with respect to its passing must have been completed but it is immaterial whether its provisions have been suspended and do not become operative until a stipulated date(y).

A by-law, when no time is specified therein for its taking effect, goes into operation immediately after its passage(z). So there is no necessity for the council to state in its by-laws a day from which they are required to take effect unless the statute so directs(a) and, in the absence of a provision to the contrary in the statute under which a by-law is passed(b) or in the by-law itself(c), a by-law becomes effective(d) on the date on which it is finally passed, signed and sealed(e). The effect of s. 259(3) of the Ontario Act authorizing the sealing of by-laws unsealed through oversight is to permit the sealing to relate back to the day on which the by-law was passed(f). It is not fatal to the validity of a by-law that it was put into force as soon

> as it was passed contrary to a statutory provision that it was not to go into effect until a certain time had elapsed after its passing(g). In such case the by-law will be effective at the expiration of the period prescribed by statute(h).
>
> A by-law may be passed and yet its operation may be postponed either by reason of its containing a suspending clause or by reason of a statute which requires some additional act to be done before it can take effect. By-laws which require approval, publication or registration come into operation on the happening of a condition subsequent. If promulgation is necessary, then the by-law speaks from the date of its promulgation(i) unless it is otherwise provided(j). Similarly, by-laws which are prohibited from coming into force until approved by a municipal board do not take effect nor are they enforceable until approved(k). On the other hand, where the statute directs that a by-law be registered in the local registry office 'before the same shall become effectual in law'(l) such a requirement is a condition not only of its efficacy but also of its validity(m). The same thing is also true of a by-law which is required to be published 'before coming into effect'(n)."

It seems clear from the above authority that the by-law creating the new O2-B Zone was "passed" on May 21, 1986, when the Council in one motion (as appears from the Council Minutes filed as Exhibit A-38) amended the text of the Town's Land-Use By-law by creating the new O2-B Zone and also "approved an amendment to the Zoning Map rezoning lands of Y.M.C.A. ... from the Medium-Density Residential (R-2) Zone and the Downtown Outer Commercial (C1-B) Zone to the new (O2-B) Zone". At this point in time these amendments to the Town's Land-Use By-law obviously did not "come into force" by reason of s.s.(5) of Section 60 of the Planning Act as the time for appeal had not then elapsed.

What then was the legal effect of the Council's motion "passed" on May 21, 1986? The Council had done everything required of it aside from its statutory obligation in s.s. (3) of Section 60 of the Planning Act to give Notice of the passing of the by-law amending the Land-Use By-law and its obligation to file with the Provincial Director of Planning certain information within ten days of the passing of the by-law in order to create the new zone and to change or rezone the Y.M.C.A. land to that zone. These by-laws were at that time complete as far as the Town Council was concerned as there was no further action required under the Planning Act on the part of the Town [aside from the requirements of Section 60(3)]. What then is the effect of the words in s.s.(5) of Section 60 of the Planning Act which read:

> "An amendment to a land-use by-law does not come into force until the time for appeal has elapsed or, ...".

Clearly the amendment was not "into force" on May 21, 1986. Since there was in fact, no appeal taken from the Council's decision to amend the text of the Land-Use By-law it obviously came "into force" immediately after the 21-day appeal period had expired and not before.

In Ontario, Section 34(31) of the 1983 Planning Act of that Province provides that a zoning by-law does not come into force until all appeals have been finally disposed of whereupon the law except for such parts as are repealed or amended on appeal "shall be deemed to have come into force on the day it was passed". There is no such deeming provision in s.s. (5) of Section 60 of the Planning Act of Nova Scotia.

Counsel for the Town refers to the Construction of Statutes by Driedjers and the following quotation from page 171 of that text where the author distinguishes between the enacting of legislation and its coming into force in these words:

> "There is a distinction between the enactment of a statute (i.e. the completion of the formal enacting process) and its commencement, or coming into force.
>
> There is a distinction in meaning, though rarely respected, between 'passing' and 'enacting' a statute. A bill 'passes' a house or the hearing of a legislative body, and is 'assented to' by or in the name of the sovereign; when so 'passed' and 'assented to', it has been enacted by the legislature.
>
> The terms enactment and commencement are not necessarily the same; a statute may be operative as of the day of its enactment or, if it so provides, as of an earlier or later date".

Counsel for the Town also refers to a Supreme Court of Canada case The City of Winnipeg v. Brock (1911), 20, W.L.R. 243; 45 S.C.R. 271 where Fitzpatrick, C.J.C. in distinguishing between when a by-law is passed and when it is in force, states that "by 'passed' I presume is meant that at that date the by-law was so complete in itself that it effected the purpose for which it was intended, although, possibly, it might not be brought into force until a later date".

Counsel for the Town in his brief states that:

"It is submited that upon the passage by the Town of Amherst of the amendment to the text of the land use bylaw, the bylaw was complete and effective: City of Winnipeg v. Brock. The operation or enforceability of the bylaw was simply suspended until the expiry of the appeal period, as provided for in S. 60(5). The amendment to the bylaw does not rely upon any condition precedent (e.g. Ministerial approval) for its existence, but is subject only to be overturned on appeal. If an amendment to a bylaw does not exist until the appeal period has expired, then there is no amendment from which to appeal. The right of appeal pursuant to S. 63(1) is from an amendment to a land use bylaw, not a decision of council.

If this Board were to decide that the textual amendment to the land use bylaw did not exist because it was not 'in force', then this appeal could not exist because no bylaw amendment would exist from which to appeal. Pursuant to S. 63(2) the decision of Council can only be appealed from if Council has refused an amendment following an application. There was no such refusal in this situation.

We make the following additional submission to the Board, all of which bears directly upon how properly to interpret the Planning Act, S. 60(5).

1. The Planning Act, S. 2(d) states as follows:
S. 2 The purpose of this Act is to:

(d) provide for the fair, reasonable and effective administration of this act, in order that sound development may be encouraged."

An interpretation of S. 60(5) that would lead to delay and confusion in the planning and appeal processes would be contrary to S. 2(d) and the intent of the legislation. To the extent that there is more than one interpretation of S. 60(5), it ought to be interpreted in the manner most likely to lead to 'efficient administration of this Act'. We submit that the most efficient and reasonable interpretation of S. 60(5) would be that an amendment to a land use bylaw exists upon its passage by Council but that its operation is suspended during appeal periods.

2. The boundaries of a particular zone can be created by textual amendment and by map amendment. In most circumstances, the text of the land use

> bylaw establishes permitted uses and restrictions in building sizes, yard requirements, etc. in each particular zone. Although the Town of Amherst has not chosen to do so, the boundaries of each zone could also be established by the use of text in conjunction with and to clarify maps. Zoning maps have equal status to the text of a land use bylaw. The boundary lines of zones are no less or no more important than the permitted uses or yard requirements of each zone. A land use zone is a complete package, consisting of boundaries and other limiting factors as set out in the land use bylaw. The fact that two or three or more separate amendments to a land use bylaw properly create a new zone, does not put one amendment in a superior position to any other. A zone without boundaries is equally as untenable as a zone without permitted uses, or yard requirements. From this perspective, we submit that the concern over the interpretation of S. 60(5) is simply not relevant to this appeal. There is no requirement in the Planning Act which puts the creation of permitted uses or yard requirements of a zone as conditions precedent to creation of the boundaries. Each amendment relies on the other, but no amendment has superiority over the other."

It is the opinion of the Board that the by-law although "passed" by the Council on May 21, 1986, amending the Land-Use By-law by creating a new O2-B Zone did not come "into force" that is, it was probably not in effect or capable of being acted upon or utilized by the Council until the statutory appeal period had expired. Counsel for the Town in his brief stated that "its operation is suspended during appeal periods". The word "into" has been held equivalent to or synonymous with "at" as will be noted by reference to Black's Law Dictionary, 5th ed. The word "force" is defined by Black's Dictionary as meaning "efficacy; legal validity". Black states that "this is the meaning when we say that a statute or a contract is 'in force'". The words "in force" which would appear to have the same meaning as "into force" have been defined as meaning validly in force. (See In Re Turner and Laity, 13 D.L.R. 532).

Stroud's Judicial Dictionary, 4th ed. vol. 3, p. 1312 makes the following comment respecting the words "in force", viz:

> "A section of an act may be in operation without being in force, e.g. s. 86 of the Agriculture Act, 1947 (c. 48) was brought into operation on October 1 1947, although it was not to be treated as being in force until an Order was made."

There does not appear to be a clear-cut or definitive statement of the law as to the true legal effect to be given to a by-law amending a Land-Use By-law pursuant to Section 60(1) of the Planning Act properly "passed" by a Municipal Council where at the time the by-law was passed the by-law does not come "into force" until a later date by virtue of the wording set forth in s.s.(5) of Section 60 of the Planning Act.

In the case at hand the by-law amending the Land-Use By-law by creating the new O2-B Zone came "into force" 21 days after the advertisement in a newspaper by the Town of the Notice of the passing of the by-law. If the By-law was not "into force", which is clearly the case, it is questionable whether the Council on May 21, 1986, could validly make an amendment to its land-Use By-law amending the Town's Zoning Map by rezoning the Y.M.C.A. property to an O2-B Zone which at that time was not "into force"?

If the Planning Act contained a provision similar to Section 34(31) of the 1983 Ontario Planning Act deeming the by-law "to have come into force on the day it was passed" where no appeal had been filed or where the appeal had been disposed of, the by-law in question would be deemed to have come into force. There is no such provision in the Nova Scotia Planning Act.

The Board has concluded that it is open to some doubt as to whether the Council had lawful authority to rezone the Y.M.C.A. lands to O2-B Zone on May 21, 1986 as at that time the O2-B Zone was not "into force" although validly passed by the Council on May 21, 1986. By virtue of not being "into force" the by-law amendment although in existence may not at that time have had any operative effect or vitality to enable the Council to rezone lands to a zoning category (O2-B) not then "into force".

Counsel for the Town submits that upon the passage of the by-law amendment "the by-law was complete and effective". With respect the Board disagrees that the by-law was comlete and effective at that time because of the fact that Section 60(5) of the Planning Act states that the by-law does not come "into force" until the appeal period has expired or where an appeal has been filed that appeal has been disposed of. If the by-law is not "into force" it is doubtful that it is "complete and effective".

Section 53(1) of the Planning Act states that "Zones shall be established in a land-use by-law by the use of maps and text". The Board is of the opinion that it is at least doubtful that a council can rezone lands to a zoning category which may not yet be established because it is not "into force", that is effective and operational and therefore capable of being acted upon.

In Corporation of The Township of Oro v. Kneeshaw 9 M.P.L.R. 306, Osborne J. of the Ontario Supreme Court had to consider a preliminary motion by the Defendant that the Municipality's action was improperly constituted. In that case the Municipality brought action to enjoin a certain use of land because it was prohibited by a zoning by-law. The Municipality's writ was issued after the passing of a zoning by-law by Council but before the O.M.B. had approved the by-law. Prior to the hearing of the case, the O.M.B. approval had been obtained and to use the words of Osborne J., "The result of that approval is that the Zoning By-law of the Plaintiff must be given effect to as of the date of its passage by the Council".

Osborne J. at page 308 stated that "It appears to me that as of the date that the writ was issued in this matter, the Zoning By-law was not an enforceable by-law. Its vitality was fed by the subsequent Ontario Municipal Board approval. Its effective date then, but only then, became the date it was passed by Municipal Council".

The Oro v. Kneeshaw case lends some judicial support to the Board's concern that the Council may have been premature on May 21, 1986 in attempting to rezone lands to a zone created by a by-law amendment not yet "into force".

An amendment to a land-use by-law passed but not yet in force by reason of Section 60(5) of the Planning Act may nevertheless be appealed to the Board by certain persons pursuant to Section 63(1) of the Planning Act provided by Notice of Appeal is served on the Board "within twenty-one days of the date of the publication of the advertisement required ...". It is obvious therefore that the Planning Act provides for an appeal before the amendment to the land-use by-law is "into force".

In the case at hand the Appellant Donald Sauveur filed within the statutory time an appeal not against the amendment to the Town's Land-use By-law respecting the creation of a new O2-B Zone but against the amendment to the Land-Use By-law to rezone the Y.M.C.A. lands to O2-B Zone.

The Board on the evidence adduced at the hearing of the appeal has no difficulty in determining pursuant to Section 63(3) of the Planning Act that the decision of the Council in rezoning or intending to rezone the subject Y.M.C.A. lands to O2-B Zone "reasonably carries out the intent" of the Town's Municipal Planning Strategy and in that regard accepts the evidence of the Planner, Rich McCready and the Director of Planning, Jens Jensen.

The Board's options are set out in s.s. (4) of Section 63 which states that:

> "The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board."

The Board is restricted under s.s. (5) of Section 63 not to allow the appeal "unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy". The Board from the evidence adduced is unable to determine that the decision of the Council cannot reasonably be said to carry out the intent of the M.P.S. and therefore is not able to allow the appeal.

It is the Board's opinion that the proper procedure for the Council to have followed in this matter was to firstly pass an amendment to its Land-Use By-law creating a new O2-B Zone and then after this amendment came "into force" following the expiration of the appeal period it could have then validly and effectively amended its Land-Use By-law by rezoning the Y.M.C.A. lands to the O2-B Zone.

This opinion about the procedure to be followed creates a serious dilemma for the Board. On the one hand it is clearly of the opinion that the Council was acting within the intent of the M.P.S. in establishing the O2-B Zone and it was also acting with the intent of the M.P.S. in intending to rezone the subject property to the O2-B

Zone. On the other hand, the Board has some doubts as to whether the Council properly succeeded in rezoning the Y.M.C.A. property to the O2-B Zone it created.

The Board is of the further opinion that it has no alternative based on its options available under Section 63(4) of the Planning Act but to confirm the decision of the Council made on May 21, 1986, in amending the town's Land-Use By-law by rezoning the subject lands to O2-B Zone by assuming that the Council's decision of May 21, 1986, creating the O2-B Zone was validly in effect notwithstanding the doubts expressed in this decision. The Board makes this assumption on the basis that it has no power or authority to declare that a municipal by-law is legally invalid or is defective in some respect and must therefore assume the validity of the by-law in question.

Had the Council's decision in amending its Land-Use By-law by the creation of the O2-B Zone taken place at some date prior to May 21, 1987, it is not likely that the amendment would be the subject of any scrutiny by the Board and would probably have been assumed to have been validly enacted. In the case at hand the Council in one motion purported to create the new zone and also purported to rezone the Y.M.C.A. property to that new zone.

It is unfortunate that the Board has felt compelled to include in this decision its reasons for casting some doubt on the procedure followed by the Town in this case since from the evidence at the hearing it is clear that the Town went to some considerable effort to satisfy the concerns expressed by the Appellants. The Board is clearly of the opinion that the creation of the O2-B Zone meets the intent of the Town's M.P.S. and that the rezoning of the Y.M.C.A. property in question to the O2-B Zone is also within the intent of the M.P.S.

The Board hereby dismisses the appeal and confirms the decision of the Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 30th day of January, A.D., 1987.

Robert H Blois

ROBERT H. BLOIS,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Ramey v. Town of Bedford

PLANNING--ZONING AMENDMENT--APPROVAL TO REZONE FROM R-1 TO C-5--WHETHER AGGRIEVED PERSONS--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, SS. 63(1),(3),(4)--TOWN OF BEDFORD MPS, SECTION 5, POLICIES C-1, C-4, C-13, Z-4

This is an appeal by S.R.R. from a decision of the Council of the Town of Bedford approving the rezoning of three properties on the Bedford Highway from Residential Single Family (R-1) Zone to Commercial Highway-Oriented (C-5) Zone. Counsel for the owners of the subject properties and for the Town objected to the status of the Appellant as an aggrieved person. All the properties and property immediately adjacent and to the south are designated commercial on the Generalized Future Land Use Map of the Town's Municipal Planning Strategy (MPS). The properties were originally zoned C-5 by the Town's Land-Use By-law approved by the Minister in 1982. In 1983 they were rezoned R-1, and the decision under appeal here to rezone back to C-5 was made in 1986.

HELD: The Board confirms the decision of Council and dismisses the appeal.

The Board cannot make a determination of the status of the Appellant without hearing sufficient evidence. Having heard the Appellant's case, the Board determined that sufficient evidence had been led on the matter of proximity to the subject properties to justify continuation so that the Board could make a final determination on status. The onus is on the Appellant to prove that she is an aggrieved person. The Board has no difficulty in determining that she has established herself as an aggrieved person. The proximity of her property (sharing a common boundary), the wide difference in allowable use and intensity of use between the subject properties and her own, and her belief that one or more of these uses will negatively affect the value of her residential property are sufficient proof the Appellant has a substantial grievance. The evidence established that the rezoning could have an adverse effect on the value of the Appellant's property which might lead to a pecuniary loss. Therefore the Appellant has a legal grievance and is "an aggrieved person."

The Board is required by s.63(3) of the Planning Act to determine "whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy." The subject properties were zoned General Business Zone by the County of Halifax prior to Bedford's incorporation in 1980 and the Town's MPS and first Land-Use By-law designated the lots commercial after the usual public participation process. They were rezoned residential in 1983 to allow a family member to build a home on what is a four-lane highway. The Land-Use By-law provides for a degree of buffering between adjacent commercial and residential land uses. This provision together with the existing mature trees on the common boundary and the marked typographical separation should offset the impact. The Board accepts that the rezoning reasonably carries out the intent of the MPS.

NSMB-532-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An appeal by Shirley R. Ramey from a decision of the Council of the Town of Bedford made May 20, 1986, which amended the Town's Land-use By-law by rezoning properties known as Civic Numbers 1711, 1715 and 1717 Bedford Highway from Residential Single Family (R-1) Zone to Commercial Highway-Oriented (C-5) Zone.

BEFORE: ELIZABETH SALTON, Vice-Chairman

COUNSEL: SHIRLEY R. RAMEY, Appellant and her Husband, REV. NEIL BERGMAN, on their own behalf;

ELWIN J. MACNEIL, LL.B., representing the owners of 1711,1715 and 1717 Bedford Highway;

PETER A. MCINROY, LL.B., on behalf of the Town.

DECISION

A hearing was held in the Council Chambers of the Town of Bedford on September 22nd and 23rd, 1986, on an appeal by Shirley R. Ramey pursuant to Section 63(1) of the Planning Act from a decision of the Council of the Town of Bedford made May 20, 1986, which amended the Town's Land-use By-law by rezoning properties known as Civic Numbers 1711, 1715 and 1717 Bedford Highway from Residential Single Family (R-1) Zone to Highway-Oriented

Commercial (C-5) Zone. Notice of Appeal (Exhibit R-1) dated June 13, 1986 was received by the Board on the same day. At the request of the Board, an Amended Notice of Appeal (Exhibit R-2) was filed in accordance with the Board's instructions. The Amended Notice of Appeal was dated June 21, 1986 and received by the Board on June 23, 1986.

The grounds of the appeal as set out in both Exhibits R-1 and R-2 are as follows:

> "1. The property value of 16 Oakmount Drive, which is where I reside and shares over a two hundred foot (200') boundary with the rezoned property, is adversely affected by the decision of Town Council;
>
> 2. Potential development allowed under the new zoning will leave the house at 16 Oakmount Drive drastically exposed through probable excavation up to eight feet (8') from the house and other exposures to odours and noise at many hours of the day and night."

Affidavits proving service of the Notice of Hearing as instructed by the Board (Exhibit R-5) were filed by the Appellant, Shirley R. Ramey and her husband, Rev. Neil John Bergman. Service of the Notice of Appeal, the Amended Notice of Appeal, the Notice of Hearing and the advertising of the Notice of Hearing were all proven to the satisfaction of the Board. With no objection from the parties on these matters the Board proceeded to hear the appeal. Objection was raised by Counsel for the owners of the subject properties and by Counsel for the Town to the status of the Appellant as an aggrieved person. The Board ruled that it could not make a determination of the status of the

Appellant without hearing evidence cn the appeal sufficient to make such a determination.

The subject properties - Civic Number 1711, 1715 and 1717 Bedford Highway - are located on the east side of the Bedford Highway, immediately north of Oakmount Drive which runs initially east off the Bedford Highway and then north giving access to Oakmount Subdivision, a single family residential development. Civic Number 1711 Bedford Highway and Civic Number 16 Oakmount Drive have a 200 foot common boundary. None of the subject properties have frontage on Oakmount Drive. All of the subject properties,and the property immediately adjacent and to the south of Civic Number 1711 Bedford Highway known as 16 Oakmount Drive and owned by the Appellant, are designated "Commercial" on the Generalized Future Land Use Map of the Town's Municipal Planning Strategy (MPS). A two family dwelling is located on 1711 Bedford Highway. The properties known as Civic Numbers 1715 and 1717 Bedford Highway have single family homes located on them.

Civic Numbers 1711, 1715 and 1717 Bedford Highway and Civic Number 16 Oakmount Drive were zoned C-5 by the Town's Land-use By-law which came into force with the approval of the Minister on September 8, 1982. In April 1983 all four properties were rezoned R-1 Single Family Residential. The decision under appeal was to rezone all three properties fronting on the Bedford Highway back to C-5, Highway Oriented Zone, leaving the adjacent property,Civic Number 16 Oakmount Drive, Zoned R-1.

Shirley Ramey, Appellant, and her husband, Rev. Neil Bergman, gave evidence and called one other witness. Counsel for the owners of the subject properties called three witnesses. Counsel for the Town called the Town's Senior Planner.

Rev. Bergman had been aware of the proposed rezoning of the subject properties and Civic Number 16 Oakmount Drive in 1983 from C-5 to R-1. At that time he was not married to Ms. Ramey and was a resident of Dartmouth. He had attended the public hearing on that rezoning application and recalled that Town Staff had recommended the addition of 1717 and 1711 Bedford Highway and 16 Oakmount Drive to an application which had been originally made only for Civic Number 1715 Bedford Highway. Of the three rezonings in four years of the subject properties, two had included 16 Oakmount Drive but the latest had not. No personal notice had been given to Ms. Ramey of the latest rezoning here under appeal. Ms. Ramey had attended the public hearings on the 1983 and 1986 rezoning applications and spoken at both.

Rev. Bergman showed 15 colour slides (Exhibit R-20) taken in July 1986 by himself at various locations on Civic Number 16 Oakmount Drive showing the house located on that property and views of the subject properties. Rev. Bergman asserted that his major concern was that the rear of 1711 Bedford Highway would be excavated and the trees along the property boundary removed, exposing the house to the Bedford Highway. He expressed anxiety as well about possible noise and odours if one or more of the subject properties were used for a fast food outlet. He believed that all of these possibilities - possible excavation, erosion, removal of trees and possible nuisance from a commercial food outlet - would all make the property at 16 Oakmount Drive much less attractive and less enjoyable and he feared that its property value would therefore be reduced.

In his opinion, Rev. Bergman felt that Council's rezoning of the subject properties from R-1 to C-5 was "the least desireable outcome of all the changes in recent years". Reading from the list of allowable uses in the C-5 Zone he concluded that most of them would be incompatible to the single family residential use of 16 Oakmount Drive. He concluded that almost any other zoning of the subject properties, either residential or commercial, would bring a higher market price (for 16 Oakmount Drive) than having a common boundary with property zoned C-5.

According to Rev. Bergman, his wife had decided to appeal the rezoning of the subject properties rather than to seek similar zoning for 16 Oakmount Drive because they did not wish to sell the property and because the rezoning of 16 Oakmount Drive from R-1 to C-5 would be opposed by residents of Oakmount Subdivision.

Rev. Bergman noted that Section 5 of the Town's MPS (Exhibit R-12) containing policies on commercial development in the Town, outlines 5 categories of commercial use to be the basis for specific commercial zones, and describes the characteristics of "General Commercial/Highway Oriented Uses" as follows:

> "Business uses that in order for them to successfully exist require long hours of operation, large parking areas, loading facilities, are high generators of traffic, require a high level of exposure and in some cases generate higher than normal noise and dust levels. This category would include uses such as: service stations, auto sales, fast food outlets, trailer sales, lounges, community shopping centres, etc."

He further noted Policy C-4 which states:

> "It shall be the intention of Town Council, in regulating general commercial or highway oriented uses, to take into consideration the potential imcompatibility of these uses with residential uses (hours of operation, traffic generation, and noise), and to minimize the impact on the arterial road system by regulating signs and access."

Rev. Bergman proposed an alternative solution to the rezoning of the subject properties from R-1 to C-5. He suggested that 1711 Bedford Highway which is immediately adjacent to 16 Oakmount Drive should be zoned residential. He said he would not be opposed to Residential Two Family (R-2) Zone for 1711 Bedford Highway which would correspond to its current use and would allow 25% of the floor area to be used for a home occupation. Additionally he suggested that 16 Oakmount Drive should be zoned R-2 as well, since it was built as a two-family home. The rezoning of 1711 Bedford Highway and 16 Oakmount Drive to R-2 in his opinion would provide a better buffer between the C-5 zoning of 1715 and 1717 Bedford Highway and the remainder of Oakmount

Drive which is zoned R-1.

In support of his alternative solution, Rev. Bergman filed a petition which he had circulated in the Oakmount Subdivision (Exhibit R-9) containing 13 signatures beneath the following statement:

> "PETITION
>
> I, the undersigned, acknowledge having seen the notice of appeal to the Municipal Board by Shirley Ramey of the decision of Bedford Town Council to rezone 1711, 1715, and 1717 Bedford Highway from R-1 to C-5.
>
> I also express my concern about the spread of Highway-oriented commercial development to the very edge of the Oakmount subdivision and its possible extension up part of Oakmount Drive.
>
> As a possible solution, perhaps not the only solution, I would support a zoning of R-2 for 1711 Bedford Highway and 16 Oakmount Drive, understanding that both of these dwellings are two-family dwellings by design. By right, 25% of a dwelling could be used for resident-owned business under a residential zone. Any other commercial use of the corner properties would be better handled by contract zoning (these properties are designated commercial on the future land use maps) than by re-zoning to any of the existing commercial zones of the Town of Bedford."

In cross-examination, Rev. Bergman agreed that properties fronting on both sides of the Bedford Highway in the area of the subject properties were all designated commercial in the Generalized Future Land Use Map of the MPS and that there were existing commercially zoned lots on the side of the Bedford Highway opposite Oakmount Drive. Rev. Bergman said that he had been misquoted in the copy of the minutes of the

Public Hearing held May 14, 1986 (Exhibit R-4) on the rezoning application now under appeal. The minutes state that Rev. Bergman suggested "that perhaps the property located at "17 [16] Oakmount Drive could be given the same consideration for rezoning as the other three properties involved". Rev. Bergman said that he had suggested that 16 Oakmount Drive and 1711 Bedford Highway should be zoned the same but not that both be zoned C-5. He acknowledged that he had spoken against the proposed rezoning of the subject properties at the public hearing.

Rev. Bergman agreed that 16 Oakmount Drive was 15-20 feet higher in elevation than the adjacent 1711 Bedford Highway and that the trees which form a physical buffer between the two properties are located mainly on the subject properties and on a portion of the "Tully property" which is immediately adjacent to a portion of the rear boundary of 16 Oakmount Drive. Rev. Bergman was uncertain whether the policies in the MPS on buffering would be effective in sheltering 16 Oakmount Drive from commercial uses on the subject properties.

Rev. Bergman acknowledged that he had asked the Town's planning staff if 16 Oakmount Drive could be included in the rezoning application for the subject properties after the public hearing on that application was advertised, but he explained that that enquiry was made without consultation with Ms. Ramey, who was not his wife at that time, just to explore the options available to her.

If 1711 Bedford Highway were graded to the elevation of the highway, there would be a 30-40 foot difference in elevation between that property and 16 Oakmount Drive, according to Rev. Bergman. If the existing trees at the rear of the subject properties remained in place, Rev. Bergman's concerns about the threat to the existing tree buffer between 16 Oakmount Drive and the subject properties would be eliminated. He was not opposed to all categories of commercial use of the abutting property at 174 Bedford Highway. That property was acceptable as commercial "depending on the use", especially if it were a small business which "may not need as much area".

Shirley Ramey recounted the history of her family's acquisition of 16 Oakmount Drive and the subsequent rezoning events. Until 1977, Ms. Ramey had lived with her parents in an apartment in Halifax. When their apartment was converted to a condominium which her parents could not afford to purchase, two of her uncles had assisted with the purchase of 16 Oakmount Drive and the construction of the dwelling presently located on it. The house was constructed as a split level to allow separate living space for Ms. Ramey, who lived on the lower level, and her parents who intended to live on the upper level. Ms. Ramey's father died immediately before moving into the house; her mother died in 1984.

In 1979 Ms. Ramey had the property appraised. The appraiser described the property as being located in a single family residential area. Ms. Ramey first became aware of the

1986 application to rezone the subject properties "with the public hearing notice". Prior to that, the owner of 1711 Bedford Highway had informed Ms. Ramey of an intention to list that property for sale without indicating that the property might be commercial rather than residential.

Under cross-examination, Ms. Ramey stated that she felt "wronged" by the rezoning of the subject properties from R-1 to C-5 because she was concerned for the value of her property, and considering the allowable uses in the C-5 zone, felt they would diminish its value. Her concerns about the potential commercial uses allowable on the subject properties, especially 1711 Bedford Highway, centered around anticipated problems with noise, litter, pollution and drainage. She experiences some noise now from commercial properties located to the north of 1717 Bedford Highway and some odour and noise from Arby's Restaurant and the Ponderosa located across the Bedford Highway from Oakmount Drive.

Mrs. Mary Crouse who has lived at 18 Oakmount Drive for the past three years expressed similar reservations about the possible devaluation of her property because of the rezoning of the subject properties to C-5. Her property at 18 Oakmount Drive is separated from that of the Appellant (16 Oakmount Drive) by a right-of-way approximately 26 feet wide leading to the Tully property which abuts the Crouse property at the rear. The Crouse property has no common boundary with any of the subject properties and is at a higher elevation above them than the Ramey property. Mrs. Crouse stated that she could look down into the subject properties from her house.

At the conclusion of the Appellant's case, Counsel for the owners of the subject properties raised the issued of the status of the Appellant and argued that Ms. Ramey had not established that she was an aggrieved person, although she had an onus to do so. The Board determined that sufficient evidence had been led on the matter of the proximity of the Appellant's property to the subject properties to justify the continuation of the hearing so that the Board could make a final determination on the status of the Appellant.

John Malcolm, Senior Planner and assistant Development Officer with the Town of Bedford gave evidence on the zoning history of the subject properties and on the policies of the Municipal Planning Strategy and Land-use By-law as they affected this area of the Town. Mr. Malcolm who has a Master's Degree in Urban Planning from York University, was qualified as an expert witness in planning matters.

Mr. Malcolm reviewed the future land use designation and zoning of the subject properties and also of 16 Oakmount Drive from 1982,when the Town's Municipal Development Plan (MPS) and Zoning By-law (Land-use By-law) were approved and came into force,to the present time. All four properties - 1711, 1715, 1717 Bedford Highway and 16 Oakmount Drive - were designated commercial in the future land use map of the MPS in 1982 and have remained so ever since, notwithstanding changes in zoning.

The MPS designated the subject properties and 16 Oakmount Drive commercial and all four properties were zoned C-5 effective September 8, 1982. In 1983 the son of the owner of 1717 Bedford Highway applied for a permit to build a single family home on 1715 Bedford Highway - then vacant - which was not an allowable use in the C-5 zone. Faced with the alternative of applying for a development agreement or a rezoning of 1715 Bedford Highway, the applicant chose rezoning. Both Staff and the Town's Planning advisory Committee (PAC) at that time felt that all four lots (the subject properties and 16 Oakmount Drive) should be rezoned from C-5 to R-1, which was approved by Council

In 1986 the owner of 1715 Bedford Highway initially, followed by the owners of 1711 and 1717 Bedford Highway, applied for rezoning of their properties from R-1 to C-5 in order to achieve the best market price as all three subject properties were to be sold for various personal reasons. Again staff and PAC recommended approval of this rezoning application, which Council approved May 20, 1986.

Mr. Malcolm commented that since 1982 much of the land in the vicinity of the subject properties designated and zoned commercial had been developed commercially so that only 3 parcels of C-5 zoned land were currently vacant in the Town. He foresaw a "scarcity" of C-5 zoned land "approaching".

Mr. Malcolm cited various policies in the MPS which he considered relevant to the rezoning application for the subject properties. The commercial policies he cited are the following:

> "Policy C-1
>
> It shall be the intention of Town Council to encourage a range of commercial uses sufficient to serve the variety of community needs within the Town and surrounding areas. Provision shall be made for local business uses, commercial uses, general commercial (Highway Oriented), heavy commercial uses, shopping centres, neighbourhood convenience stores, service commercial uses and massage parlours within the areas designated commercial on Map 7 entitled Generalized Future Land Use Map."
>
> "Policy C-4
>
> It shall be the intention of Town Council, in regulating general commercial or highway oriented uses, to take into consideration the potential incompatibility of these uses with residential uses (hours of operation, traffic generation, and noise), and to minimize the impact on the arterial road system by regulating signs and access."
>
> "Policy C-13
>
> It shall be the intention of Town Council to minimize the impact of commercial uses and commercial parking areas abutting existing or designated residential uses through regulations in the Zoning By-law, and through the development and subsequent enforcement of an unsightly premises By-law."

Mr. Malcolm stated that the Town had an Unsightly Premises By-law in place and in operation. The majority of citizen complaints relating to unsightly premises have been complaints about residential rather than commercial properties.

Mr. Malcolm cited Section 33 of the Town's Land-use By-law which states:

> "ABUTTING ZONE REQUIREMENTS
>
> Where a commercial or industrial zone abuts existing or designated residential uses or zone in order to

provide a visual and noise barrier between these uses the following shall apply to the abutting yards:

a) the minimum distance between the main buildings shall be 25 feet. The sideyard requirement for the residential uses shall be 10 feet and the sideyard requirement for the commercial use shall be 15 feet;

b) no open storage or outdoor display shall be permitted in the required abutting yard in the Commercial or Industrial Zone;

c) where parking spaces are provided in an abutting yard within 15 feet of the side or rear lot line in the Commercial or Industrial Zones the provisions of Section 23(h) shall apply;

d) in addition to the provisions of Section 30, signs located in an abutting yard shall be subject to the following requirements:

  i) all signs shall be non-illuminating;

  ii) only directional or business identification signs shall be permitted;

  iii) the maximum sign area shall be fifteen (15) square feet;

  iv) the maximum height of a ground sign from the grade level to the highest part of the sign (including the sign structure) shall be fifteen (15) feet;

  v) all signs shall be set back at least ten (10) feet from the abutting property line.

e) obnoxious uses shall not be located in abutting yards."

Section 23(h) states

> " Where commercial or industrial parking areas abut existing or designated residential uses, such commercial or industrial parking areas shall be screened by buffers, fences or a combination thereof".

The application of this Section of the by-law to the subject properties would probably result in the existing trees being retained on the east and south boundaries of 1711, 1715 and 1717 Bedford Highway, according to Mr. Malcolm.

Mr. Malcolm reviewed in detail the provisions of Policy Z-4 of the Municipal Planning Strategy which enumerates criteria to be used in evaluating zoning amendments. In the staff report on this rezoning application prepared for PAC and Council, dated February 24, 1986 (part of Exhibit R-3), Mr. Malcolm applied the criteria of Policy Z-4 to the proposal at hand as follows:

> "1. That the proposal is in conformance with the intent of this plan and with the requirements of all other Town By-laws and Regulations.
>
> As noted in Section 1 above, this proposal to rezone the properties from R-1 to C-5 is in conformance with the areas' commercial future land use designation. The commercial objective of the MDP calls for the development of business and commercial uses which are consistent with the preservation, creation and maintenance of a well balanced community and which are appropriately located in relation to neighbourhoods, the Town or the region. As can be seen on Map 2 all of the properties that front on the Bedford Highway in this area are presently zoned C-5 (Highway-Oriented) with the exception of the Bedford Baptist Church which is zoned Institutional. The existing uses as shown on Map 3 for the properties further north along Bedford Highway are in fact highway-oriented uses and this proposal to rezone the property to allow for further highway-oriented commercial development would fall in line with the existing uses along Bedford Highway at this point.
>
> 2. That the proposal is compatible with adjacent uses and the existing development form in the area in terms of the use, bulk and scale of the proposal.
>
> As noted above, the rezoning would allow for the development of commercial uses that would in effect be similar in nature to those existing along the highway at that point. In addition the setback requirements and height requirements of the C-5 zone would tend to result in the construction of structures similar in size and scale to what is presently there at this point. If the properties were consolidated however, there could be a long bulky commercial building constructed there.
>
> 3. Provisions are made for buffering, screening and access control to reduce potential incompatabilities with adjacent land uses and traffic arteries.
>
> As this proposal is to rezone the properties there is no development plan showing any of these features

in relation to a proposed building. It may be noted however that the Zoning Bylaw has provisions for buffering or screening between abutting commercial and residential properties such as would be the case with the properties that abut the rear lot lines of these properties proposed for rezoning. In addition there is a grade separation with the lots fronting on Bedford Highway substantially lower than those fronting on Oakmount Drive.

4. That the proposal is not premature or inappropriate by reason of:

(i) the financial capability of the Town to absorb any costs relating to the development;

If this rezoning is approved there are no anticipated costs for the Town to absorb relating to the future development of these lands.

(ii) The adequacy of sewer and water services, including fire flows and water pressure, or if services are not provided the adequacy of physical site conditions for private on-site sewer and water systems;

This area is presently served by municipal water and sewer services and the development of commercial uses on these lands should not negatively affect the services. Connection to the services is the responsibility of the land owner.

(iii) Precipitating or contributing to a pollution problem of the area.

Development of these lots for C-5 commercial uses is not expected to contribute to any pollution problems.

(iv) The adequacy of storm drainage and the effect of drainage areas on adjacent uses.

Development of these lots for a commercial use should not occasion any adverse impact on the storm drainage system in this area.

(v) The adequacy and proximity of school, recreation and any other community facilities.

As this rezoning proposal is of a commercial nature, it is not expected to have any impacts on these community elements.

(vi) The adequacy of street networks in, adjacent to or leading towards the development regarding congestion and traffic hazards.

The Bedford Highway is sufficient to provide for adequate access and egress to these properties. Driveway location would be subject to approval at time of construction.

(vii) The potential for the contamination of water courses or the creation of erosion or sedimentation.

Not applicable.

(viii) Impact on public access to the shorelines or the waterfront.

Not applicable.

(ix) The presence of natural, historical features, buildings or sites.

The Department has no knowledge of any of these features on the properties proposed for the rezoning.

(x) Creating a scattered development pattern requiring extensions to trunk facilities and public services while other such facilities remain under-utilized.

These properties lie within the primary development area and are serviced by central and water services. Commercial development of these properties would contribute to an infilling or efficient use of existing facilities.

5. [Where this plan provides for special agreements or contracts to ensure compatibility or reduce potential conflicts, such agreements may relate to, but are not limited to the following:

i) type of use, density, and phasing;
ii) emissions including air, water, and noise;
iii) traffic generation, access to and egress from the site, and parking;

iv) open storage and landscaping;
v) provisions for pedestrian movement and safety;
vi) provision and development of open space, parks, and walkways;
vii) drainage both natural and subsurface and soil stability;
viii) performance bonds;
ix) the compatibility of the structure in terms of design and appearance with adjacent residential uses.]

This proposal does not provide for special agreements or contracts and consequently Section 5 of Policy Z-4 is not applicable.

6. [Suitability of the proposed site in terms of steepness of slope, soil conditions, rock outcroppings, location of watercourses, marshes, swamps, bogs, areas subject to flooding, proximity to major highways, ramps, railroads, or other nuisance factors.]

These lands appear to be suitable for further re-development since they have already been developed for residential homes. The removal of these units and replacement of same by a commercial development should not be affected by the suitability of this site in terms of its terrain.

7. [In addition to the foregoing, all zoning amendments and contract zoning agreements shall be prepared in sufficient details to provide:

(i) Council with a clear indication of the nature of the proposed development, and,

(ii) Permit staff to assess and determine the impact such development would have on the proposed site and the surrounding community.]

The rezoning of these properties from R-1 (Residential Single Family) to C-5 (Commercial-Highway Oriented) would allow for the development of service stations, auto repair shops, auto sale shops, fast food outlets, outdoor market, movie theaters, trailers/mobile home sales, neighbourhood convenience stores, commercial parking lots, display or model homes or any of the uses permitted in an Institutional zone.

> Any of the above noted uses would be allowed to be developed as a matter of right under this zone providing that they meet the C-5 zone setbacks and height restrictions, parking requirements and buffering requirements between abutting commercial and residential zones. The impact of this commercial rezoning in terms of actual commercial development would likely be minimal on the adjacent residential lots which abut the rear lot lines of these properties, provided that the various General Provisions of the Zoning Bylaw were strictly enforced. Traffic flows in and out of the lands proposed for the rezoning would enter and leave from the Bedford Highway. Therefore the residential community of Oakmount Subdivision would not be impacted by additional traffic flows resulting from commercial development on these properties."

Mr. Malcolm commented that the "pollution problem" referred to in Section 4(iii) he understood to refer to problems such as oil pollution in the river or litter. He explained that storm drainage plans would have to accompany an application for a development permit for a commercial use. He would not expect that storm drainage would be routed (uphill) towards 16 Oakmount Drive, but rather to the Bedford Highway.

In conclusion, Mr. Malcolm stated the existing development on the Bedford Highway and the existing traffic volumes on it both "argued for C-5 zoning of the subject properties", and the PAC had so recommended to Council. Mr. Malcolm believed that Council's decision to approve this rezoning application carried out the intent of the MPS.

Under cross-examination by Mr. Bergman, Mr. Malcolm agreed that maps in the staff reports prepared on this rezoning application had mistakenly referred to 16 Oakmount Drive as 17 Oakmount Drive and had shown no building located on the property. He stated that excavation of any property - residential or commercial - could proceed at any time and was beyond the Town's ability to control. The Land-use By-law had no provision for control of hours of operation for a commercial enterprise. Mr. Malcolm said that a dry-cleaning plant would not be permitted in a C-5 zone, nor would on-site storage of materials on commercially zoned properties which abut residentially zoned properties.

Mr. Malcolm said he believed that the 1983 rezoning of the subject properties together with 16 Oakmount Drive from C-5 to R-1, which was initiated by an application to rezone only 1715 Bedford Highway, was expanded by PAC because "some human concerns were present". Planning staff at the time stressed that the commercial designation for all four properties should remain and expressed the opinion that the rezoning from commercial to residential could be reversed in future if needed, although the applicants should be cautioned that rezoning to commercial can be difficult. Mr. Malcolm recalled that the hearing of the 1983 rezoning application had been adjourned for a month to allow time for input by Mr. Bergman on behalf of Ms. Ramey.

Mrs. Phyllis Martin, joint owner with her husband William Howard Martin of 1711 Bedford Highway, outlined the history of her family's property ownership in the area of the subject properties. Mrs. Martin currently rents 1711 Bedford Highway to a daughter and lives herself in Dartmouth with another daughter. Her husband is in a home for special care suffering from Alzheimer's Disease and she must sell 1711 Bedford Highway to continue to pay the $800.00 a month needed for his support. She said she had tried to sell the property for two years but those interested were all attracted only by its commercial possibilities. She had signed an agreement of purchase and sale conditional on commercial rezoning.

Mrs. Martin said her husband's family had purchased the 22 acre Tully property in 1942. Much of the Oakmount subdivision was developed from it and 16 Oakmount Drive is in the centre of the driveway to the old Tully homestead (still in existence). All three lots - 1711, 1715 and 1717 Bedford Highway - were approved lots (in the Municipality of the County of Halifax) in 1954. Her home at 1711 Bedford Highway was built in the 1950's when the area was "almost a rural community" - the highway was only two lanes instead of the current four; there were trees in front of the house now gone because of highway widening; there was rural mail delivery, wells rather than municipal water service, and Oakmount Subdivision did not exist. Because of the subsequent changes in the area, Mrs. Martin concluded that commercial designation and commercial zoning was the most logical for her property since "it has no further value as a residence".

In cross-examination, Mrs. Martin said she had not opposed the wishes of her nephew Gary Martin to rezone 1715 Bedford

Highway from C-5 to R-1 because it was "a family matter". She had felt that if the commercial designation in the MPS was retained it would be possible to rezone back to a commercial zone if and when that was necessary.

Gary Martin, owner of 1715 Bedford Highway and son of Albert Martin (owner of 1717 Bedford Highway) related the family circumstances which led to the zoning and rezonings of the subject properties. In 1982 Mr. Albert Martin became ill with cancer and Gary Martin who lived in Cole Harbour travelled back and forth regularly to help look after his parents' property, since he was the only son in the family living in Canada. Mr. Albert Martin proposed to give his son the vacant lot at 1715 Bedford Highway so that he could build a house on it. Mr. Gary Martin would have inherited 1715 Bedford Highway eventually but would not have built on it and moved to it except for his father's illness. Gary Martin had been unable to obtain a building permit for a single family dwelling unless the property was rezoned R-1, hence the 1983 application. Mr. Gary Martin had wanted only 1715 zoned residentially but 1711 and 1717 and 16 Oakmount Drive had been added to the application.

In January 1986, Mr. Martin decided to sell his property and his father's because the two properties were becoming too big for him to manage. If sold, Mr. Gary Martin would move with his family and his parents to a smaller property which could accommodate both families. Neither he nor his father had an agreement of purchase and sale for their properties, as did his Aunt, Mrs. Phyllis Martin.

At the conclusion of the evidence called by the Appellant, by Counsel for the Martin family and Counsel for the Town, the Board heard oral argument on the status of the Appellant as an aggrieved person and on the merits of the appeal. The Board had previously visited the subject properties and surrounding area. The Board has considered the evidence presented at the hearing and the written and oral argument on the issues involved in this appeal.

The Board has stated in several previous decisions where the status of the Appellant was at issue, that the onus is on the Appellant to prove that he is an aggrieved person. If the Appellant does not so qualify himself, the Board does not have jurisdiction to make a determination on the merits of the appeal. In order to establish whether or not the Appellant is an aggrieved person, however, some evidence on the facts of the decision under appeal must be heard.

In this appeal, the Appellant is the owner of a property immediately adjacent to one of the three adjacent properties rezoned by Council from R-1 to C-5. The Appellant's property has a common boundary of approximately 200 feet with the adjacent rezoned property, although the Appellant's home is located at a considerably higher elevation. There is a row of mixed spruce and deciduous trees along this boundary line which is very close to the rear of the Appellant's home.

The Appellant's property, like the subject properties, is designated commercial. Although the Appellant was unaware of it, her property was designated commercial and zoned C-5 in 1982 with the approval of the Town's first MPS and Land-use By-law. In 1983 her property was included without her knowledge or consent in a rezoning application for the subject properties from C-5 to R-1. In 1986 her property was not included in a rezoning of the subject properties from R-1 back to C-5 although all four properties remained commercially designated.

The 1983 and 1986 rezoning decisions may have affected the market value of the Appellant's property although she did not participate in the decisions to include or exclude her property in the subject properties' zonings from intensive commercial zoning to single family residential and back again. The Appellant stated in evidence that she was concerned for the value of her property and considering the allowable uses in the C-5 Zone felt that they would diminish the value of her property The allowable uses in the C-5 Commercial Highway-Oriented Zone are the following:

a) Service Stations
b) Auto Repair Shop
c) Auto Sales
d) Fast Food Outlets
e) Outdoor Markets
f) Movie Theatres
g) Trailer/Mobile Home Sales
h) S-1 uses subject to the S-1 requirements

i) Neighbourhood Convenience Stores
j) Commercial Parking Lots
k) Display or Model Homes
l) Uses accessory to any of the foregoing uses

Notwithstanding the provisions in the Land-use By-law for buffering between commercial and residential zones, and the difference in elevation between the Appellant's property and the immediately adjacent property which is one of the three properties rezoned, the Board has no difficulty in determining that the Appellant has established herself as an aggrieved person. The proximity of her property to the subject properties, the wide difference in allowable use and intensity of use between the subject properties and her own, and her belief that one or more of those uses will negatively affect the value of her residential property are sufficient proof for the Board that the Appellant has a substantial grievance. The evidence heard by the Board concerning the decision under appeal established that the rezoning of the subject properties could have an adverse affect on the value of the Appellant's property which might lead to a pecuniary loss, and therefore the Appellant has a legal grievance in this matter and is "an aggrieved person".

The Board is required by Section 63(3) of the Planning Act to determine "whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy".

Before the incorporation of the Town of Bedford in 1980, the subject properties were zoned General Business Zone by the Municipality of the County of Halifax. As the name of the zone implies, that zone allowed commercial uses. In 1982 the properties were designated commercially in the Town's MPS and zoned commercially under the Town's Land-use By-law after the usual public participation process. The zoning of the subject properties (and 16 Oakmount Drive) changed to residential to allow a family member to build a home on one of the three subject properties. Rather than rezone one lot residential with commercial zoning on either side, Council at that time decided to change all three subject properties plus 16 Oakmount Drive in a block. The rezoning of the three subject properties back to their "original" commercial zone removed the anomaly of restrictive residential zoning of three adjoining properties designated commercial and located on a 4-land highway in an area of intensive commercial use.

According to the expert planning witness, Mr. Malcolm, the property of 16 Oakmount Drive, although similarly designated commercial, relates more to the residential Oakmount Subdivision of which it is a part. It has no frontage on the Bedford Highway. It is moot whether an application for rezoning to C-5 for 16 Oakmount Drive in addition to the subject properties would have been recommended by staff and/or approved by Council. No such application was made.

In this appeal, the Board is confronted with a rezoning of the subject properties which conforms to the Generalized

Future Land Use set out in the MPS and which is identical to the zoning of the subject properties established under the Town's Land-use By-law in 1982. At the same time the Appellant's property immediately adjacent to one of the subject properties is zoned restrictively residential although it too is designated commercial. The ostensible incompatibility between the R-1 residential single family property of 16 Oakmount Drive and the C-5 Highway Oriented Commercial properties at 1711-1717 Bedford Highway results from a decision of Council in 1983. That decision to rezone to R-1 the subject properties together with the property of the Appellant was in contradiction of the intent expressed in the Generalized Future Land Use of the MPS.

The Board has carefully considered the provisions in the Land-use By-law which provide a degree of buffering between adjacent commercial and residential land uses and concludes that if enforced they minimize many of the concerns expressed by the Appellant. These buffering provisions previously cited in this decision, together with the maintenance of the existing mature trees along the common boundary between 16 Oakmount Drive and 1711 Bedford Highway and the marked topographical separation between the two properties should offset the impact on 16 Oakmount Drive of the potential C-5 uses allowable on 1711, 1715 and 1717 Bedford Highway.

The analysis by Mr. Malcolm of the commercial policies applicable to the subject properties and to the application for rezoning set out in detail earlier in this decision resulted in his conclusion that the proposed rezoning met the intent of the MPS. The Board cannot disagree. The Appellant has not discharged the onus on her to prove otherwise. The Board accepts the evidence of Mr. Malcolm that the rezoning of 1711, 1715 and 1717 Bedford Highway from R-1 to C-5 reasonably carries out the intent of the Municipal Planning Strategy.

The Board has not considered the alternative zoning proposal made by Rev. Bergman because the only issue before it is whether the decision of Council reasonably carries out the intent of the MPS.

Council may wish to give some consideration during the five-year review of its MPS to the issues arising from the interface of residential and commercial designation at the entrance to the Oakmount Subdivision.

Pursuant to Section 63(4)(a) of the Planning Act the Board confirms the decision of Council. The appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 11th day of February, A.D., 1987.

E A Salton

ELIZABETH SALTON
Vice-Chairman

Home East Developments Ltd. v. County of Halifax

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE 70 ACRES FROM R-7 TO R-1 --WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, SS. 33, 34, 63(1)(b),(3),(4),(5)--COUNTY OF HALIFAX COLE HARBOUR/WESTPHAL MPS, SECTION 3, POLICIES P-41, P-42, P-92, P-93

This is an appeal by H.E.D. Ltd. from a decision of the Council of the County of Halifax refusing to rezone approx. 70 acres of the Appellant's land at Cole Harbour from Rural Estate (R-7) Zone to Single Unit Dwelling (R-1) Zone. The subject land is covered by the Cole Harbour/Westphal Municipal Planning Strategy (MPS) and lies within the "Residential B Designation" on the Generalized Future Land Use Map in the MPS. The County's Planning Department and the Planning Advisory Committee recommended approval of the application. The Director of Planning for the County expressed the opinion that refusing the Appellant's application to rezone did not reasonably carry out the intent of the MPS because the MPS intends that opportunities be available to develop the land and that, if the items suggested by the MPS to be evaluated result in a favourable evaluation, there should in fact be an approval of the rezoning.

HELD: The Board allows the appeal and instructs Council to amend its Land-Use By-law by rezoning the subject lands to R-1.

The Board is obliged by s.63(3) of the Planning Act to determine "whether the decision of the Council reasonably carries out the intent of the municipal planning strategy." For the Appellant to succeed the Board must determine that the proposed amendment meets the intent of the MPS and also that the decision of Council under appeal cannot reasonably be said to carry out the intent of the MPS. The Appellant has succeeded here. The MPS conforms to the Halifax-Dartmouth Regional Development Plan in designating the area as a "priority area for continuing residential development." This residential development is not unlimited or uncontrolled, but must proceed in accordance with the policies and objectives set out in the MPS. The subject lands are in the "Residential B" Designation in the MPS, which means they are lands where low density residential development is to be encouraged. Nevertheless "Residential B" lands may have more dense development after an examination of their suitability. The specific criteria for development on lots less than 80,000 sq. ft. are set out in Policies P-42 and P-93. The MPS encourages more intensive residential development where the physical, social and environmental effects of the proposed development do not have a negative effect on the existing community. From the uncontradicted evidence such appears to be the case here. It is implicit in Policy P-42 that Council should approve the amendment if the subject lands are capable of higher density development under these circumstances.

NSMB-539-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **HOME EAST DEVELOPMENTS LIMITED** from the decision of the Council of the Municipality of the County of Halifax made July 7, 1986, refusing the Appellant's application to amend the City's Land-Use By-law by rezoning approximately 70 acres of land at Cole Harbour from Rural Estate (R-7) Zone to Single Unit Dwelling (R-1) Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: THOMAS O. BOYNE, LL.B., and PETER TRASK, Articled Clerk for the Appellant, HOME EAST DEVELOPMENT LIMITED,

ROBERT G. CRAGG, Q.C., for the Municipality of the County of Halifax.

DECISION

This is an appeal by **HOME EAST DEVELOPMENTS LIMITED**, hereinafter called "Home East", pursuant to Section 63(1)(b) of the Planning Act, S.N.S., 1983, Chapter 9 from the decision of the Council of the Municipality of the County of Halifax, hereinafter called "the Council", made July 7, 1986, refusing the application of the Appellant, Home East, to amend the Municipality's Land-Use By-law by rezoning approximately 70 acres of land at Cole Harbour from Rural Estate (R-7) Zone to Single Unit Dwelling (R-1) Zone.

The Appellant's Notice of Appeal filed as Exhibit C-1 is dated July 25, 1986, and was received by the Board on the same date. At the request of the Board the Appellant filed an Amended Notice of Appeal (Exhibit C-2) which is dated July 31, 1986 and was received by the Board on August 1, 1986.

The hearing of the appeal took place in the hearing room of the Expropriations Compensation Board, 1660 Hollis Street, HALIFAX, on December 22, 1986.

The grounds of appeal set forth in the Appellant's Notice of Appeal are as follows:

> "1. Although no reason was given in either resolution presented by Council or the Notice received from the County Clerk advising the Applicants why their application had been refused, it was evident at the Council meeting that the Councillors opposed the re-zoning due to concern of the possibility of arsenic in the domestic water supply to the lands, and also, the possible adverse affect of siltation into the waters of Cole Harbour.
>
> The Appellant, however, asserts that there was no evidence whatsoever to support either of these concerns. All the evidence to Council confirms that there has never been a reported case in Nova Scotia of naturally occurring arsenic poisoning in a dug well.
>
> There was no evidence presented that would enable the members of Council to conclude that siltation would occur, or that if it did it would be significant and would cause harm to the waters of Cole Harbour.
>
> In fact, the evidence presented by professional engineers, hydrogeologists and others support the position that there is no possibility of arsenic contamination in the domestic water supply to the units, nor any significant amount of siltation to affect the waters of Cole Harbour.
>
> 2. The Appellant maintains that the decision of Council cannot reasonably be said to carry

> out the intent of the Municipal Planning Strategy, and that furthermore, the Appellant would suffer undue hardship if the Council's decision were to stand."

Counsel for the Appellant filed with the Board as Exhibit C-3 the Affidavit of Peter Trask, Articled Clerk, sworn to on December 22, 1986, in proof of the Board's requirements as to service of the Notice of Hearing. The Clerk of the Board arranged to have the Notice of Hearing published in the Halifax Chronicle-Herald and Mail-Star by three insertions which appeared on December 1st, 8th and 15th, 1986. Copies of the newspaper advertisements are filed as Exhibit C-10.

The Board having been satisfied that the Appellant's Notice of Appeal had been filed within the 21-day appeal period and being satisfied that the Notice of Hearing had been published in a newspaper circulating in the Municipality by three consecutive weekly insertions preceeding the date of the hearing and that the Appellant had properly served the Notice of Hearing on the assessed owners within 500' of the subject site and had also served those persons specifically mentioned in a letter from the Clerk of the Board to the Appellant's solicitor, proceeded to hear the appeal on the merits. Counsel for the Municipality agreed that the appeal was properly before the Board.

Counsel for the Appellant and for the Municipality made brief opening statements indicating that there was a Municipal Planning Strategy (Municipal Development Plan) in effect for the Cole Harbour - Westphal area which includes the subject property. A copy of this Plan was filed as Exhibit C-8. Counsel for the Appellant relied on Policy P-42 set out in the Residential B Designation of Section III of the Plan. This Policy authorizes Council to consider permitting development on lots of less than 80,000 sq. ft. in size by amendment to the Zoning By-law. The present R-7 Zoning of the subject lands provides for a minimum lot area of 80,000 sq. ft. Policy P-42 states that Council in considering such an amendment must have regard to seven matters set out in the Policy. He submitted that the Council did not deal with these seven items or considered them in error. The subject lot lies within the "Residential B Designation" shown on the Generalized Future Land Use Map 1 forming part of the M.P.S. for the Cole Harbour/Westphal area.

Counsel for the Municipality in his opening statement indicated that the evidence given to Council was fair and the Council's decision in rejecting the application reasonably carries out the intent of the M.P.S.

The first witness called by the Appellant was Valerie Spencer, the Director of Planning and Development for the Municipality. The Board agreed to hear her evidence as a land-use planning expert. She had approved the Planning Report dated April 7, 1986, submitted to the P.A.C. in connection with the Appellant's application. A copy of this report appears under tab No. 3 of Exhibit C-6. She was appointed Director of Planning in October of 1986.

Ms. Spencer was referred to a Plan of Survey of Coleridge Estates, a subdivision of lands of Home East Developments Limited at Cole Harbour filed as Exhibit C-4. This plan shows a subdivision of land on the north side of the Cole Harbour Road immediately west of an abandoned gravel pit and directly opposite Pacific Avenue, a street on the south side of the Cole Harbour Road. The subdivision plan filed as Exhibit C-4 includes the subject lands as well as other lands owned by the Appellant lying between the subject lands and the Cole Harbour Road. The subject lands are presently zoned R-7 and the adjoining subdivided lands of the Appellant are zoned R-1. The subject lands are bounded on three sides by lands zoned R-7 and on the remaining or south easterly side by lands zoned R-1. She stated that a red line shown on the map was the approximate boundary between lands zoned R-1 and lands zoned R-7. This red boundary line runs parallel to and 500' north of the Cole Harbour Road.

Ms. Spencer outlined the process followed by the Planning Department in preparing a staff report. A planner is assigned to carry out an investigation concerning a rezoning application and then prepares a report after consultation with others in the Planning Department as well as with persons in other departments. The final report is checked by the Director of Planning who signs it along with the Chief Administrative Officer of the Municipality. It is then submitted to the Planning Advisory Committee (P.A.C.).

Exhibit C-7 is an extract of the Minutes of a P.A.C. meeting held on April 28, 1986 when the application to rezone the subject property was discussed. The P.A.C. recommended approval of the application to Council.

Ms. Spencer indicated that the R-7 (Rural Estate) Zone permitted single unit dwellings on a minimum lot area of 80,000 sq. ft. whereas the R-1 (Single Unit Dwelling) Zone required a minimum lot area of 20,000 sq. ft. (where on-site services are provided).

The P.A.C. Minutes of April 28, 1986, stated that Councillor Mont who had not read the consultant's report prepared by Porter Dillon Ltd. on behalf of Home East had expressed three concerns:

(1) that the proposal is a major development in an environmentally sensitive area;

(2) the access onto the Cole Harbour Road;

and

(3) the possibility of arsenic in the water.

Ms. Spencer indicated that there were letters from the Provincial Departments of Environment, Health and Transportation all of which are favourable to the Appellant's application for subdivision approval which application was proceeding contemperaneously with the rezoning application. Copies of these letters appear under Tab 1 of Exhibit C-6.

It is noteworthy that a letter from the Atlantic Health Unit, Department of Health dated January 30, 1986, while recommending tentative approval of the subdivision showing lots 11 - 79 inclusive states that "This subdivision is in an area subject to possible high arsenic concentration in drilled wells. The Public Health Inspector should add to any on-site sewerage permits the following:

> "This lot is in an area where high arsenic concentrations may be encountered in drilled wells. The lot owner is advised to have any drilled wells sampled and analysed for arsenic after 4 to 6 weeks of use."

Ms. Spencer was referred to Policy P-42 on page 35 of the M.P.S. She explained that this policy permits the Council to consider "removing" the Rural Estate Zone (R-7) in favour of an R-1 Zone and directs Council to consider certain things.

Ms. Spencer reviewed the seven criteria set forth in Policy P-42 which the Council must have regard to in considering applications to permit development on lots containing less than 80,000 sq. ft. which are situate in the Residential B Designation, that is, in the unserviced area. She went over all seven items and stated that the Planning Department had satisfied itself that the proposed rezoning and residential development met all of these criteria.

Counsel for the Appellant referred Ms. Spencer to Policy P-93 on page 73 of the Municipality's Municipal Development Plan which directs Council to consider certain specific criteria set forth in that Policy "in considering amendments to the zoning by-law or development agreements, in addition to all other criteria as set out in various policies of this Plan ...". These criteria are as follows:

> "(i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations;
>
> (ii) that the proposal is not premature or inappropriate by reason of:
>
> a) the financial capability of the Municipality to absorb any costs relating to the development;
>
> b) the adequacy of sewer and water services;
>
> c) the adequacy or proximity of school, recreation and other community facilities;
>
> d) the adequacy of road networks leading or adjacent to or within the development; and
>
> e) the potential for damage to or destruction of designated historic buildings and sites.
>
> (iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:
>
> a) type of use;
>
> b) height, bulk and lot coverage of any proposed building;
>
> c) traffic generation, access to and egress from the site, and parking;
>
> d) open storage;
>
> e) signs; and
>
> f) any other relevant matter of planning concern.
>
> (iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding."

Ms. Spencer went over each of the above-mentioned criteria and indicated that she was of the opinion that the proposed rezoning is in conformity with the intent of the Plan and with the requirements of all other municipal by-laws and regulations. She indicated that she had not changed her opinion since the time of the Staff Report and was supportive of the recommendation in the Staff Report to allow the rezoning.

The following analysis by staff of the Appellant's application is set forth in the Staff Report of April 7, 1986:

> "ANALYSIS
>
> The municipal planning strategy for Cole Harbour/Westphal designates this property Residential B. The designation has been applied in other areas of the communities, particularly on lands which lie well beyond existing development and major roads. Lands within this designation are generally characterized by poor soil conditions and high water tables. The planning strategy is intent on keeping the density of new developments relatively low, thereby reducing the potential for groundwater contamination and the subsequent demand for central water and sewerage services.
>
> With respect to this application, protection of the environmental qualities of the property and surrounding areas (including Cole Harbour) are of primary importance. The applicant's planning consultant (Porter Dillon Limited) has undertaken an extensive study of on-site sewage disposal and water capabilities on the property. The consultant has concluded that:
>
> 'Although the land may fall under Category 1 lot classification, constraints such as probable excessively drained overburden, slope and bouldary terrain limit the size of each lot. It is therefore recommended that each lot be a minimum of 40,000 square feet to adequately sustain a drilled/dug water supply and sewage disposal system.'
>
> The Departments of Health and the Environment are in agreement with the consultants' findings and recommendation and have given their respective approvals to the tentative plan of subdivision.

The plan shows 55 lots - the majority of which range in area from 40,000 - 50,000 square feet. This is well beyond the 20,000 square foot minimum permitted by the land use by-law and will ensure adequate protection of surrounding land uses and nearby watercourses.

The Departments have also examined water samples on the property and suspect that iron, manganese and arsenic may be encountered in both drilled and dug wells. However, the agencies have stated that quality problems can be chemically treated provided that wells are properly constructed and periodically tested. The department of the Environment has outlined a specific course of action for dealing with this situation.

The planning strategy further recognizes that the construction of new roads to open up presently inaccessible lands may adversely impact on community form. As illustrated by Map 3 (p.5), existing land uses in the vicinity of the property are located along the Cole Harbour Road. The applicant's intention to shift development in the area to a more concentrated infilling situation is in conformity with the intent of the Plan, in terms of the Municipality's ability to deliver such fundamental services as police and fire protection, school busing and public transit. It should also be noted that the applicant has designed a road pattern that provides three points of access to abutting landholdings. This is again in keeping with the Plan's intent to ensure that new subdivisions within the Residential B Designation do not become isolated developments by virtue of a poorly designed road system.

CONCLUSION

While the general intent of the Residential B Designation is to keep the density of new developments relatively low, it also functions to provide an opportunity to evaluate the physical, social and environmental effects of new developments on the existing community. The plan has anticipated the eventual demand for housing within the designation and requires consideration of the issues forming Appendix "A" of this report.

The Department of Planning and Development has based its review of the proposed subdivision on these issues and has concluded that the development conforms with the intent of the planning strategy."

Appendix "A" referred to in the Staff Report is an extract from Policy P-42 which reads as follows:

> "P-42 Notwithstanding Policy P-41, Council may consider permitting development on lots which have an area of less than eighty thousand (80,000) square feet, by amendment to the zoning by-law. When considering any such amendment, Council shall have regard to the provisions of Policy P-93 and the following:
>
> i) the effects of the development upon the existing on-site sewer and water facilities of neighbouring lands;
>
> ii) provisions made to ensure a potable water supply to uses within the development;
>
> iii) the co-ordination of proposed road systems within the development with the existing and proposed road systems of neighbouring lands;
>
> iv) provisions made to provide adequate setbacks from watercourses;
>
> v) the potential for expansion of the development in terms of available lands and their locations relative to the development and neighbouring lands;
>
> vi) provisions intended for the dedication of parklands or cash-in-lieu in terms of optimum community use; and
>
> vii) any additional information, and information relating to (i) through (vi) above, as shown on a tentative plan of subdivision."

On cross-examination Ms. Spencer indicated that the proposed lots in the area in question would be approximately 40,000 sq. ft. in size. She was asked how staff could insist on the Appellant providing lots of an average size of about 44,000 sq. ft. when the R-1 Zone permits lots of 20,000 sq. ft. She stated that the tentative plan of subdivision of the subject property showed only 40,000 sq. ft. lots on average and she said that once tentative approval had been given for these lots, the developer could not reduce these to 20,000 sq. ft. in his application for final approval. She also said that the size of the lots was arrived at by virtue of the input from the Departments of Health and Environment which were prepared to approve lots in the 40,000 sq. ft. range.

On cross-examination Ms. Spencer said staff was aware that there was a problem with arsenic in the subject area but she was of the understanding that there are mechanical means (filters) of treating water affected by arsenic. She was also asked if siltation was a problem in the subject area. She said it was a potential problem but staff had determined that it would not affect the marsh lands which are prevalent in the Cole Harbour area. Ms. Spencer indicated on cross-examination that there are some areas on the south or water side of the Cole Harbour Road in the vicinity of Lawlor's Point where development may take place only by way of development agreement. Lawlor's Point is directly opposite the subject site.

Ms. Spencer was asked by the Board if she thought the Council's decision in any way offended the Municipality's Planning Strategy. She responded by saying "I believe so". She was then asked in what respect, and she replied that:

> "The Planning Strategy in my opinion does not intend that R-7 lands remain undeveloped, nor does it intend that R-7 always remain at 80,000 sq. ft., nor does it intend that development in the vicinity of Cole Harbour not take place because there is an environmental concern. The

> Planning Strategy does in my opinion by offering a mechanism such as the rezoning procedure by establishing zones to allow development does intend that opportunities will be available to develop the land. Certainly the Planning Strategy does intend in my opinion to provide for development, to provide for residential development and to provide for the logical use of property. The Planning Strategy suggests items to be evaluated and the implication is that in my opinion if those items result in a favourable evaluation then there should be in fact an approval of the rezoning. According to the staff and myself there was a favourable evaluation and therefore to refuse the application would not carry out the intent of the Planning Strategy."

Ms. Spencer expressed her opinion that the Council's decision in rejecting the Appellant's application for rezoning did not reasonably carry out the intent of the M.P.S. based on the evaluation process set out in the M.P.S. approved by the Council.

The next witness called by the Appellant was Hugh Porter, the President of Porter Dillon Ltd. He is a Professional Engineer and Land-Use Planner and was accepted by the Board as a person qualified to give expert testimony on engineering and land-use planning matters. He was referred to Exhibit C-4, the Subdivision Plan of Coleridge Estates, which was prepared by his company. He stated that his company had been retained by the Appellant in connection with the rezoning application as well as the subdivision approval process.

Mr. Porter referred to another plan prepared by his company (Exhibit C-5) which is entitled "Coleridge Estates, Cole Harbour, Halifax County, N.S., Water Drainage Plan". He said that the subject lands are outlined in red on this plan. He indicated that the subject lands are a portion of a watershed area containing 1000 acres which extends northerly to the southern side of Highway No. 7. He indicated that this watershed is drained by two means, one a stream running out of Broom Lake in the northern portion of the watershed. The stream passes through the northwest corner of the subject lands and eventually enters into Cole Harbour. The other means of drainage is over the eastern portion of the subject lands into two small ponds one on either side of the Cole Harbour Road and then through Lawlor's Point to the waters of Cole Harbour. He stated that his company's testing of the soil indicated an overburden on the subject lands of between ten and twenty feet. He described this overburden as a silty, sandy, gravel of which gravel constitutes 50%, sand 30% and and silt sized particles 20%. The site is covered with a good soft tree cover but there is some hardwood regeneration in areas that had been cleared.

Mr. Porter said his company dug a test pit on the site to a depth of 10 feet which produced water at the rate of two gallons per minute. He said the average demand per house per day is only 300 gallons which means that the test pit produced nearly ten times the average daily demand per household. Mr. Porter said that while there is a filtering device which is available and has received approval from Government which is used in connection with drilled wells he has recommended that the subject site be developed by means of dug wells without the use of filters. He said most of the proposed lots could be developed by means of dug wells which he says are not prone to arsenic contamination, whereas 20 - 30% of drilled wells are subject to arsenic deposits and would require filters. He said test holes were made in the 24 lots comprising the existing R-1 subdivision and no arsenic was detected.

Mr. Porter said he recognizes that Cole Harbour is an environmentally sensitive area. He contrasted the sandy, silty gravel overburden on the subject site with the heavy clay till generally found in other parts of Cole Harbour. Clay he said, is made up of very fine particles which do not settle out as quickly when they enter a water course as the type of overburden material on the subject site. He said the erosion on the subject site is minimal and the water which is discharged from the subject site contains a minimum of sedimentation.

Counsel for the Appellant referred Mr. Porter to Policy P-42 in the Municipality's Planning Strategy (Exhibit C-8) and asked him to review the seven items which Council must regard in considering an amendment to the Land-Use By-law to permit development on lots having an area of less than 80,000 sq. ft. Mr. Porter went over each of the first six items for consideration by Council under Policy P-42. With respect to item (i) he stated that the proposed development of residential lots would not have any effect upon the existing on-site sewer and water facilities of neighbouring lands. With regard to item (ii) he stated that in his opinion the subject site would produce sufficient potable water to service the development. As to item (iii) Mr. Porter stated that the roads were designed so as to link up with the adjoining lands. Item (iv) deals with adequate setbacks from watercourses. Mr. Porter stated the setback from watercourses is largely determined by the requirements of the Department of Health. He said if any portion of a lot is within 75' of a water course the minimum lot size is 40,000 sq. ft. With respect to item (v) (the potential for expansion of the development), Mr. Porter indicated that there is the potential for expansion to the north and to the west. He stated that the land immediately to the east is the site of an abandoned gravel pit and it was not likely that this site would be developed for some considerable period due to the high cost of developing the site for residential purposes. With respect to item (vi) he stated that the developers had set aside a 7.6 acre parcel of land as proposed open space in the north west corner of the subject site. He said that this proposed open space site had been examined by Municipal Officials and would provide a suitable area for public use. Item (vii) for Council's consideration under Policy P-42 is:

> "any additional information, and information relating to (i) through (vi) above, as shown on a tentative plan of subdivision".

Mr. Porter was referred to Policy P-93 which lists four additional criteria for the Council to follow in processing zoning by-law amendments. These have been previously set out in full in this decision. The first of these relates to the proposal being in conformity with the intent of the Plan and with the requirements of all other municipal by-laws and regulations. Mr. Porter stated that in his opinion the proposed development of the subject site into residential lots of less than 80,000 sq. ft. meets the intent of the Plan. Mr. Porter said that when the Plan was prepared, large areas outside the serviced area were zoned Rural Estate (R-7) which permitted development on large lots (80,000 sq. ft) as no detailed planning had taken place to ascertain whether environmental conditions would permit residential development on smaller lots in specific tracts of land. He said the Plan makes provision for approval of amendments to the Land-Use By-law to accommodate these specific tracts of land which meet the requirements of the Plan. He said that the subject lands are about 1000' east of the present serviced area boundary.

Mr. Porter gave his opinion that the proposal is not premature or inappropriate by reason of the items listed in item (ii) of Policy P-93. He also expressed the opinion that the proposal meets the criteria set out in items (iii) and (iv) of Policy P-93.

Mr. Porter expressed the opinion that the proposed rezoning of the subject lands to R-1 from R-7 meets the intent of the M.P.S. (the Plan).

Mr. Porter was asked what hardship would be imposed on the developer if the rezoning was not approved. Basically his answer was that the cost of development would be spread over a smaller number of lots, 30 rather than 55 which would make the cost per lot much greater. He indicated that a major cost in a subdivision is the cost of the road installation.

On cross-examination Mr. Porter stated that the Appellant has approval now of 24 R-1 lots in the front portion of the property and if the rezoning were approved he would be able to subdivide the subject lands into 55 R-1 lots which is 25 lots more than the 30 lots he could create if the subject lands remain R-7. In other words the rezoning process, if successful, would enable the Appellant to increase his lot potential by 25.

Mr. Porter described the R-7 Zone as "sort of a holding zone" to remain until such time as a detailed examination of these R-7 lands would determine whether or not they were capable of being reclassified to the R-1 Zone and then to be subdivided into smaller lots than are permitted in the R-7 Zone.

On cross-examination Mr. Porter was asked if the R-7 Zone for the subject lands meets the intent of the Plan. He replied that "the R-7 Zone is still appropriate subject to being able to identify the suitability of a land unit within that R-7 Zone for a development incorporating a smaller lot size such as R-1". He was then asked what would prevent the developer from establishing 20,000 sq.

ft. lots if the rezoning of the subject lands were approved. He answered that in his opinion that would not happen as these lands had been the subject of an investigation above the average development with a close relationship with officials of the Departments of Health and Environment. He was of the opinion that these Departments would not approve a subdivision of the subject lands into lots of only 20,000 sq. ft.

Mr. Porter was of the opinion that the present R-7 zoning for the subject lands does not meet the intent of the Plan "because I think the basis of the R-7 zoning is to provide environmental protection on land in which it was anticipated many portions of it in the areas that are now zoned R-7 would have environmental constraints. I think that on this specific parcel, the area under question, that we have demonstrated or at least certainly to my satisfaction that the natural conditions of the site are such that a smaller lot size can be accommodated". He was of the opinion that the R-7 zoning category put in place at the time of the approval of the Plan by the Minister on November 26, 1982, was appropriate and within the intent of the Plan because there had not been the detailed investigation carried out at that time to determine that the subject lands were suitable for R-1 Zoning.

Following the completion of the hearing of the evidence, counsel presented oral argument respecting the issue before the Board as to whether "the decision of the

Council reasonably carries out the intent of the Municipal Planning Strategy." The Board is directed by the provisions of s.s. (3) of Section 63 of the Planning Act to make a determination on this issue. By virtue of s.s. (5) of Section 63 of the Planning Act "The Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy."

Counsel for the Appellant filed a post-hearing memorandum on January 14, 1987, respecting the proper interpretation to be given to s.s. (4) and s.s. (5) of Section 63 of the Planning Act. His submission as stated on page 2 of his memorandum is that "the only rational conclusion, in reading the Planning Act and the M.P.S. together, is that it was the intent of the legislature that where an existing zone and a proposed zoning both comply with the intent of the strategy, but the proposed zoning is preferable, the intent of the plan can more reasonably be met by adopting the re-zoning". Counsel for the Appellant was responding to the following comment of the Board in a recent decision respecting the appeal of Dr. S.K. Ummat from the decision of the Dartmouth City Council (N.S.M.B.-456-84-P) viz:

> "It is not sufficient for the appellant to show that the proposed application to re-zone his property meets the intent of the M.P.S. For the Appellant to succeed the Board must make a determination pursuant to Section 63, s.s. (5) that the Council's decision cannot reasonably be said to carry out the intent of the M.P.S."

Counsel for the Appellant submits that the Ummat case is distinguishable from the subject case. In his post-hearing memorandum he states that:

> "In the case at hand the intent of the M.P.S. is to provide for an orderly method by which R-7 lands may be rezoned to R-1 and sets out in some detail the criteria which must be considered in such an application. All of the evidence presented in support of application both to the Municipal Council and to the Board supported the application. The evidence presented was via the municipality's own planning staff, from Departments of the Provincial government and from a privately engaged planner, Porter Dillon & Associates. None of the evidence from these parties was contradicted either before council or before the Board and in fact no other evidence was called or presented at either hearing.
>
> It is submitted that the intent of the M.P.S. with respect to R-7 lands is to re-zone them to R-1 provided that they meet certain criteria specified in P-42 and that council's failure to so re-zone cannot be reasonably said to carry out the intent of the M.P.S."

Counsel for the Municipality did not file a post hearing memorandum.

The Board visited the subject site after the hearing and noted that the site is heavily wooded. The road marked "Coleridge Court" shown on the subdivision plan filed as Exhibit C-4 is completed. This road separates the first phase of the subdivision consisting of approved R-1 lots from the subject lands. Three houses on this road have either been completed or are in various stages of construction.

It is noted that the M.P.S. at page 3 under the heading of "Regional Context" states that:

> "The 1975 Halifax-Dartmouth Regional Development Plan designates Cole Harbour/Westphal as a priority area for continuing residential development,

> and the Plan Area is expected to maintain this role in responding to regional housing demand."

The M.P.S. at page 5 states that:

> "The Regional Development Plan also designates a 'Regional Park' along the shores of Cole Harbour. The designation supports the uniqueness of Cole Harbour as an internationally recognized biological site important to migratory Canada geese and black ducks which make use of the harbour and its salt marsh."

The M.P.S. at page 5 refers to the "environmentally sensitive lands around Cole Harbour ...".

The M.P.S. at page 28 has a section entitled "Land Use Intent". The following is taken from page 28 relating to land use intent.

> "Future land use within the Plan Area will be guided by land use policy and more specifically by the Designations of the Generalized Future Land Use Map (Map 1) which include inter alia 'Residential A Designation' and 'Residential B Designation'.
>
> The Residential A Designation recognizes the Plan Area's established community and constitutes the priority area for continuing residential development.
>
> The Residential B Designation is given to lands outside of the established community and which are not at this time accessible by public road. The Designation is intended to encourage that developments maintain low densities and to provide a thorough examination of the potential suitability of lands for more dense development, particularly with regard to known health problems in the area and the effects of new developments on the form of established communities."

Policy P-92 of the M.P.S. states at page 70 in part:

> "It is not intended that all land shall be prezoned for specific uses. Rather, in order to give council a greater degree of control, the Plan provides that certain land uses shall be considered

> only as amendments to the zoning by-law or in certain instances by development agreements... Such amendments and agreements shall be considered only if they meet the policies found within the Municipal Development Plan."

Policy P-92 provides inter alia that within the Residential B Designation "dwellings on lots having an area of less than eighty thousand (80,000) square feet according to Policy P-42" is a type of use which "shall only be considered by amendment to the zoning by-law".

Policy P-42 sets out criteria to be followed by the Council in considering an amendment to the zoning by-law to permit development on lots which have an area of less than 80,000 sq. ft. notwithstanding the provisions of Policy P-41.

Policy P-41 states that:

> "Within the Residential B Designation Council shall create a residential zone which shall permit single unit dwellings and limited day care facilities and professional offices contained within a dwelling as well as park and open space uses. The zone shall require a minimum lot area of eighty thousand (80,000) square feet."

Counsel for the Appellant submits that the Plan contemplates the process that the Appellant is going through, that is, that the Plan "broad brushes" certain lands as R-7 and then contemplates applications such as the Appellant's and establishes criteria to be followed.

The Appellant submits that the very intent of the Plan is for Council to allow this process to take place.

The Appellant submits that Council must deal "reasonably" with any information it receives concerning the application and did not do so with respect to information given to the Council by Mr. Porter concerning the possibility of arsenic being present in the water supply and with respect to siltation and sedimentation.

Counsel for the Appellant points out that if the subject lands are rezoned to R-1 Zone there is no mechanism available whereby the Appellant could be restricted to lots on average being in the 40,000 sq. ft. range and not less than 30,000 sq. ft. although that is the Appellant's intention.

Counsel for the Municipality submits that the minutes of the public hearing held on July 7, 1986, show that Council reasonably considered the application and went into it in a great deal of detail because the subject land is in a sensitive area of the Municipality. He submits that the minutes indicate that Mr. Porter was questioned by the Council on matters of their concern relating to potential arsenic, siltation and road access problems.

He further submits that the R-7 Zone was put into effect for the subject property not as a holding zone (as suggested by Mr. Porter) because the M.P.S. does not say it is a holding zone, but was put into effect because "that is what the residents wanted".

Counsel for the Municipality submits that there is a discretionary power granted to the Council to "consider" development on lots which have an area of less than 80,000 sq. ft. He argues that that doesn't obligate the Council to amend its Land-Use By-law in the situation where to refuse to amend the Land-Use By-law is reasonably consistent with the intent of the M.P.S.

Since this appeal is made pursuant to Section 63 of the Planning Act the Board is obliged to determine under s.s. (3) of Section 63 "whether the decision of the Council reasonably carries out the intent of the municipal planning strategy". If the Board's determination under s.s. (3) of Section 63 is that the Council's decision does reasonably carry out the intent of the M.P.S. the Board is then bound by the provisions of s.s. (5) of Section 63 not to allow the appeal. Therefore, for an Appellant to succeed on an appeal pusuant to Section 63 the Board must determine that the Council's decision does not reasonably carry out the intent of the M.P.S. and that the proposed amendment to the Municipality's by-law is within the intent of the by-law.

The Board affirms and adopts the statement quoted at page 20 of this decision from the Board's decision in the case of Dr. S.K. Ummat v. The Council of the City of Dartmouth (NSMB-456-84-P) where the Board stated that the Appellant in addition to demonstrating to the Board that his application to re-zone his property meets the intent of the M.P.S. must also obtain from the Board a determination that the decision of the Council under appeal cannot reasonably be said to carry out the intent of the M.P.S.

The Board having perused the evidence adduced at the hearing, having perused the Municipality's M.P.S. and Land-Use By-law, having heard argument by Counsel and having visited the subject site, determines pursuant to s.s. (3) of Section 63 of the Planning Act, that the Council's decision in refusing to approve the Appellant's application to amend the Municipality's Land-Use By-law by rezoning the subject lands, does not reasonably carry out the intent of the M.P.S.

The Board is satisfied from a perusal of the evidence and the Municipality's M.P.S. that the proposed rezoning of the subject lands from Rural Estate (R-7) Zone to Single Unit Dwelling (R-1) Zone does carry out the intent of the M.P.S.

The M.P.S. conforms to the Halifax-Dartmouth Regional Development Plan in designating the Cole Harbour/Westphal area as a "priority area for continuing residential development, and the Plan Area is expected to maintain this role in responding to regional housing demand". This does not of course suggest that unlimited or uncontrolled residential development is to take place in the Cole Harbour/Westphal area. Residential development must proceed in accordance with the policies and objectives set out in the M.P.S. The M.P.S. at page 28 states that "Future land use within the Plan Area will be guided by land use policy and more specifically by the Designations of the Generalized Future Land-Use Map (Map 1)...". This map shows the Plan Area divided into seven different Designations including "Residential

A" and "Residential B". The subject lands fall within the "Residential B" Designation.

It is clear from the M.P.S. that the "Residential A" Designation "recognizes the Plan Area's established community and constitutes the priority area for continuing development". While the "Residential A" Designation is a "priority" area for residential development it is not an exclusive area for residential development. The subject lands while being in an area with the "Residential B Designation", which means they are outside the "established community" and at the time of the Plan's approval by the Minister of Municipal Affairs (November 26, 1982) were not accessible by public road, are lands where low density residential development is to be encouraged. These "Residential B Designation" lands are nevertheless intended by the definition of these lands as it appears on page 28 of the Plan "to provide a through examination of the potential suitability of lands for more dense development, particularly with regard to known health problems in the area and the effects of new developments on the form of established communities".

The M.P.S. mandates that lands in the Residential B Designation are to be residentially zoned to permit inter alia single unit dwellings and such a zone shall require a minimum lot area of 80,000 sq. ft. (See Policy P-41). This Policy P-41 resulted in the subject lands being zoned Rural Estate (R-7) in which lots must be at least 80,000 sq. ft.

Policy P-42 of the M.P.S. provides for some flexibility in the development of lands in the Residential B Designation on lots of less than 80,000 sq. ft. by way of an amendment to the zoning by-law (land-use by-law) providing certain specific criteria are met. These criteria are contained in Policy P-42 and P-93 the details of which have been previously set out in this decision.

By virtue of the present development of that portion of the Appellant's property where there are approved R-1 lots, the Appellant has constructed a road known as Coleridge Court which runs through the Appellant's property between the approved R-1 lots and the subject R-7 lands for which the Applicant seeks approval of R-1 zoning. This means that the subject lands are now accessible by way of a public road which joins the Cole Harbour Road at the most southerly corner of the Appellant's lands as shown on the survey plan filed as Exhibit C-4.

The Board agrees with the conclusion stated in the Staff Report that while the general intent of the Residential B Designation is to keep the density of new developments relatively low, the Plan also encourages more intensive residential development in areas within the Residential B Designation where the physical, social and environmental effects of the proposed development do not have a negative effect on the existing community. From the uncontradicted evidence adduced at the hearing such appears to be the case with the subject lands.

The Board is satisfied that the proposed rezoning complies with the intent of Policy P-42 which allows Council to consider permitting development within the Residential B Designation on lots which have an area of less than 80,000 sq. ft. Not only does this Policy authorize Council to consider such development proposals which necessitate an amendment to the Municipality's Land-Use By-law but it is implicit in the Policy that Council should approve the amendment if the subject lands are capable of a higher density development without the risk of causing groundwater contamination and injury to the environment and without creating a demand for central water and sewerage services. The evidence of Ms. Spencer and Mr. Porter indicate that there is little or no such risk and there will not be a demand for central water and sewerage services. The fact that the Departments of Health and Environment have indicated their approval to a subdivision of the subject lands into lots having less than 80,000 sq. ft. each is further evidence of the lack of risk to the environment and the possibility of a health problem caused by an unsafe domestic water supply.

Because of the provision of the road access points in the tentative subdivision lay-out of the subject lands these lands will not become isolated developments as a result of a poorly designed road system.

While the Board is of the opinion that the proposed rezoning of the subject lands to R-1 and their development as building lots of less than 80,000 sq. ft. as are shown on the subdivision plan filed as Exhibit C-4, meets the intent of the M.P.S., the Board does have some concern over the point raised by Counsel for the Municipality, namely, what control or prohibition is available to the Municipality to prevent the Appellant after receiving approval for R-1 Zoning to then apply for a subdivision approval for lots of 20,000 sq. ft. which is the minimum size lots under the R-1 Zone requirements. Ideally, the proposed development of the subject lands could be implemented under a development agreement wherein a minimum size could be stipulated for the lots. Such an agreement could also make provision for ensuring that all environmental concerns and potential water supply problems are safeguarded.

It is to be noted that Policy P-92 of the M.P.S. indicates that "it is not intended that all land shall be prezoned for specific uses". Certain land uses "shall be considered only as amendments to the Zoning By-law or in certain instances by development agreements as provided for by Sections 33(2)(b) and 34 of the Planning Act". (These references are to sections in Chapter 16 of the 1969 Planning Act). Policy P-92 lists certain uses which "shall only be considered by amendment to the Zoning By-law and these uses include within the Residential B Designation "dwellings on lots having an area of less than eighty thousand (80,000) square feet according to Policy P-42".

The Board agrees with the evidence of Ms. Spencer when she stated that the "Planning Strategy suggests items to be evaluated and the implication is that in my opinion if those items result in a favourable evaluation then there should be in fact an approval of the rezoning". She and the Planning Department staff gave a favourable evaluation and she concluded that "to refuse the application would not carry out the intent of the Planning Strategy". From the evidence adduced the Board also evaluates the Appellant's application favourably.

Although none of the members of Council testified at the hearing before the Board the extensive minutes of the Public Hearing held by the Council are set out in tab 6 of Exhibit C-6. These minutes indicate the legitimate concerns expressed by some councillors relating to the environmental sensitivity of the area and to the fact that drainage from the subject lands flows downhill into Cole Harbour. Concerns were also expressed about whether the access road from the Appellant's subdivision onto the Cole Harbour Road was in a place which might create traffic problems. Another concern expressed relates to the possibility of arsenic being in the water supply. Mr. Porter's evidence which the Board accepts adequately meets these concerns. The access road to the Cole Harbour Road would require the approval of the Department of Transportation and since the road is completed it must be presumed to meet the requirements of that Department.

The Board in this case has before it the uncontradicted expert planning testimony of the Municipality's Director of Planning and that of Hugh Porter, both of whom are qualified land use planners, that the Council's decision in this case does not carry out the intent of the Municipality's M.P.S. Both of these qualified land use planners also testified that in their opinion the proposed rezoning of the subject land from R-7 to R-1 meets the intent of the M.P.S.

Although the Minutes of the Public Hearing held July 7, 1986, by the Council and on April 28, 1986, by the P.A.C. indicate that some councillors had concerns about possible arsenic problems, about possible damage to the environment and about possible traffic problems, there was no evidence before the Board that there was any substance in the subject matter of these concerns. On the contrary the evidence of Ms. Spencer and Mr. Porter dispelled those concerns. From the detailed minutes of the Public Hearing held on July 7, 1986, it would appear that Mr. Porter responded in a positive way to those concerns. It is to be noted that the municipality received certain reports from the Appellant's consultant, Porter Dillon Ltd. copies of which are to be found in Exhibit C-6. These include a copy of a letter dated July 3, 1985, signed by O. Peter Lund, B.Sc., Hydrogeologist on behalf of the consultant endorsing his company's "findings and conclusions of an investigation which examines on-site sewage disposal and water supply" for the Appellant's property. Mr. Lund's letter states inter alia that "It is therefore recommended that each lot be a minimum of 40,000 square feet to adequately sustain a drilled/dug water supply and sewage disposal system". Mr. Lund in a letter dated April 4, 1986, addressed to the Planning Department of the Municipality respecting the "Water Supply Development, Coleridge Estates" stated that "dug and drilled wells are two available options for on-site potable water supplies". He pointed out that although arsenic is a health problem there are commercial filters available to remove arsenic which are approved by the N.S. Department of Health. His letter states that "the additional costs associated with filters and maintenance may be a deterent for prospective property buyers. The option of dug well systems therefore appears more attractive. Dug wells will provide adequate yields and acceptable water quality from the gravelly sand overburden."

The Board therefore pursuant to Section 63(4)(c) of the Planning Act allows the appeal and instructs the Council of the Municipality of the County of Halifax to amend its Land-Use By-law by rezoning the approximately seventy (70) acres of land owned by the Appellant and situate at Cole Harbour from Rural Estate (R-7) Zone to Single Unit Dwelling (R-1) Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 18th day of February, A.D., 1987.

R H Blois

R.H. BLOIS,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Woodworth and Schwartz v. District of East Hants

PLANNING--ZONING AMENDMENT--APPROVAL OF REZONING OF 3.11 ACRES FROM R-4 TO C-1--WHETHER AGGRIEVED PERSONS--WHETHER REASONABLY CARRIES OUT INTENT OF M.P.S.--MUNICIPAL BOARD ACT, S. 27(2)--PLANNING ACT, SS. 63(1),(3),(5) --DISTRICT OF EAST HANTS: CORRIDOR DISTRICTS AND MOUNT UNIACKE DISTRICT INTEGRATED P.S., POLICIES P2-4, P4-21, P4-22, P9-1

This is an appeal by E.W. and E.S. as aggrieved persons from a decision of the Council of the Municipality of the District of East Hants amending the District's Land-Use By-law by rezoning 3.11 acres of land from Rural Residential and Natural Resource (R-4) Zone to Commercial General (C-1) Zone. The Applicant proposed to sell and service yard equipment (lawnmowers, rototillers, power generators and chain saws) and to service small engines. The parcel of land is covered by a Municipal Planning Strategy (M.P.S.). In response to an argument by the Municipality at the end of the Appellants' case that they were not "aggrieved persons" within s.63(1) of the Planning Act, the Board would not rule on the issue without hearing additional evidence from the Municipality.

HELD: The Board allows the appeal and reverses the decision of Council.

One issue in this appeal is whether the Appellants have discharged the onus on them to prove that they are aggrieved persons in order to qualify as Appellants pursuant to s.63(1) of the Planning Act. If they have not, the Board has no jurisdiction to consider the merits of the appeal; if they have, the Board can determine whether the decision by Council reasonably carried out the intent of the M.P.S. The Appellants are aggrieved persons. Given the permitted uses in the C-1 Zone, the size of the area rezoned, and the existing rural and residential nature of the area of the Woodworth Road, the concerns expressed by both Appellants about the impact of the commercial rezoning are legitimate. E.W.'s pecuniary interest has been affected. The distance of 200 feet from E.W.'s property to the subject one is sufficiently close in a rural area to cause an injurious effect.

Sections 63(3) and (5) of the Planning Act require the Board to determine whether the decision of the Council to rezone from R-4 to C-1 reasonably carries out the intent of the M.P.S. The Generalized Future Land Use Map of the M.P.S. designates the lands in the subject area Rural Residential and Natural Resource. The Board notes that the business proposed by the applicant may be an allowable Home Occupation in an R-4 Zone, and that the applicant originally applied for a development permit to construct a 1000 square foot building for his business rather than a rezoning. The preamble of the M.P.S. clearly expresses support for commercial development and "small business growth." The objective, though, is to encourage business development "with particular regard for the community context" of the development, such as "avoidance of land use conflicts, appropriateness of site location within the community, aesthetically acceptable development and adequate on-site parking." A rezoning that allows a wide variety of commercial uses, to a maximum floor area of 15,000 sq. ft., to be located on a small rural by-road where the existing land uses are entirely residential and farming, does not contribute to avoiding land use conflicts and is not an appropriate site location within the community. The business proposed by the applicant is compatible in nature with the area, but the potential scale permitted by the size of the property and some uses permitted in the C-1 Zone are not. If the R-4 Zone is interpreted to restrict the applicant's proposal, the flexibility intended to be the prime characteristic of the R-4 Zone will have been lost.

NSMB-515-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **ELWIN WOODWORTH and ELIZABETH SCHWARTZ** from a decision of the Council of the Municipality of the District of East Hants made March 5, 1986, which rezoned a 3.11 acre parcel of land bounded by the Woodworth Road and the C.N.R. right-of-way in Milford from Rural Residential and Natural Resource (R-4) Zone to Commercial General (C-1) Zone.

BEFORE: ELIZABETH SALTON, Vice-Chairman.

COUNSEL: ELIZABETH SCHWARTZ and ELWIN WOODWORTH, Appellants, on their own behalf;

ANTHONY FAHEY, Applicant, on his own behalf;

ROBERT CARRUTHERS, LL.B., for the Municipality.

DECISION

A hearing was held in the Council Chambers of the Municipality of the District of East Hants, in the Municipal Building, Milford, on August 13, 1986, on an appeal by **ELWIN WOODWORTH and ELIZABETH SCHWARTZ** from a decision of the Council of the Municipality of the District of East Hants which amended the District's Land-use By-law by rezoning a 3.11 acre parcel of land bounded by the Woodworth

Road and the C.N.R. right-of-way in Milford, from Rural Residential and Natural Resource (R-4) Zone to Commercial General (C-1) Zone. The Notice of Appeal is dated April 2, 1986, and was received by the Board on the same day. The grounds of appeal as stated in the Notice (Exhibit W-1) are as follows:

> "The re-zoning to commercial is completely contrary to the nature of the area within the community (and the people residing in the area) as it exsists, and was foreseen to exsist in the Municipal Development Plan, and as further described in the attached letter."

The letter which accompanied the Notice of Appeal is dated April 2nd, 1986, and reads as follows:

> "To Attention of:
> NOVA SCOTIA MUNICIPAL BOARD;
>
> We, the appellants, on behalf of the area petitioners begin by stating here-in that we bear no prejudice toward the applicant, or to development of commercial businesses in East Hants. We do not wish to be interpreted as being opposed to commercial development itself, but as to the location of commercial rezoning of lots not in keeping with the nature of the community or area where applications are made.
>
> We feel strongly that a commercially zoned lot of land on this location threatens to change the exsisting atmosphere of the neighbourhood and the people living here due to mixing rural residential with commercial out-lets in close proximity to each other.
>
> We feel that the purpose of municipal planning for land use should, in part, make some attempt to locate commercial lots in exsisting commercialized areas or away from farm land and rural residential communities where residents choose to live in commercial-free zones.
>
> Opposition perhaps would diminish, if for instance, a business were able to operate under a development agreement within the present zone as opposed to mandatory re-zoning in order to establish

a small business. Rezoning represents a final long term designation of land use of the lot. This creates a feeling by the people living in the area, of vulnerability to decisions made which can greatly affect their neighbourhood and their lives by exposure to a commercial aspect.

The lack of influence of our petition by the number of people opposed has caused loss of faith in our system. Should we be unwillingly subjected to certain rezonings that may be offensive to the people living near-by? Our opposition indicates a sizable majority of the people in the area affected!

PART 2 INDICATES MISUNDERSTANDING BY COUNCIL

At the meeting of the municipal council at which the decision was made to rezone, we were in attendance as representatives of the people opposed. We came away from the hearing with the impression that our opposition was misunderstood and-or misinterpreted (possibly understated) and therefore not properly recognized by a number of the councillors who voted in favour. Certain circumstances listed below indicate this may be the case.

1. Absence at the hearing of our own area councillor for the location in which the rezoning was proposed - hence a lack of representation.

2. Petition was briefly examined but names of petitioners were not read and at one point it was mis-stated that certain residents were in favour, when indeed, their signatures were on the petition as opposed. One person was mistakenly identified and addressed as well. This should have been corrected but never was.

3. Certain of the councillors present, who voted in favour of the rezoning, were not familiar with the area in question and in at least one case it had been interpreted to be an entirely different location. This indicates a complete misunderstanding of the circumstances involved.

4. Planning officer's report was mistaken as to the number of residences located on the road - there are double the stated number. This is an inaccuracy. We suggest as well a possible mistake in the stated measurements of distance from adjacent residences and also assessment of drainage and run-off from the lot as acceptable.

5. Failure of council to question the size of the said lot. (3.11 acres) This is far in excess of the size of lot required for the proposed purpose, and suggests if the greater part of the lot is not being put to use, then a reduction in the size of the lot may have been in order.

We believe that certain of the councillors failed to recognize the affect on residents and farmers by a commercial location in our midst. Having contacted councillors following the decision, we find that some of them would reconsider their decision if given the opportunity. We therefore request, if we are at liberty to do so, that this matter be referred back to the East Hants Municipal Council for a re-hearing and hopefully a new decision based on better understanding of the issue.

Thank-you.

Sincerely,
(sgd.)
ELWIN WOODWORTH
ELIZABETH SCHWARTZ"

The Appellants filed an Affidavit (Exhibit W-2) proving service of the Notice of Hearing on the owner (applicant) of the subject property, Anthony Fahey, and all assessed owners of property within 500 feet of the subject property. The Appellants did not serve the Provincial Director of Planning, the Minister, the Clerk-Treasurer of the Municipality, or the Solicitor for the Municipality, as instructed by the Board. The Board received notice by letter dated August 12, 1986, from the Provincial Director of Planning that he and the Minister were aware of the hearing of this appeal and agreed to waive their rights to be served by the Appellants with a Notice of Hearing. The Solicitor for the Municipality acknowledged that there had been defects in service to certain individuals required to be served under the Act and by the direction of the Board but affirmed that the Municipality was aware of the hearing and waived objection, on behalf of the Clerk-Treasurer and himself, to lack of service of the Notice of Hearing by the Appellants.

Notwithstanding the noted defects in service of the Notice of Hearing, the Board determined that service to the applicant and to the surrounding assessed landowners and advertisement of the Notice of Hearing had been satisfactorily proven. Notification to the Minister and the Municipality of the commencement of proceedings - as required by Section 27(2) of the Municipal Board Act - and substantial compliance with the Board's rules on notice, combined with waivers from the above parties and the Provincial Director of Planning concerning their rights to be served with a Notice of Hearing, lead the Board to conclude that the noted defects in service are insufficient impediments to the Board proceeding to hear the appeal on the merits. The Board did so without objection by the parties.

The subject property, "Lot J", is an unapproved lot created by a deed drawn up on June 27, 1985. "Lot J" was one of a number of lots previously consolidated as an addition to lands of James E. Woodworth by a plan registered in 1979. The boundary description of the former "Lot J" has been used by the applicant to indicate the area for which rezoning was requested, and the Municipality recognizes former "Lot J" in that respect only.

The subject property is bounded on the south by the Woodworth Road, on the west by the Canadian National Railway (C.N.R.) right-of-way, on the north by lands of C. Sidney Woodworth, and on the east by remaining lands of the Applicant. The subject property has frontage of approximately 383 feet on Woodworth Road and a common boundary with the C.N.R. right-of-way of approximately 429 feet. The north and east boundaries are approximately 361 feet and 300 feet long respectively. The Woodworth Road is a by-road at the south end of Milford running easterly from Highway 2 for approximately 3200 feet with electronic signals at the level crossing of the C.N.R. tracks. The area is zoned Rural Residential Natural Resource (R-4).

The commercial operation proposed by the Applicant is the service and sale of yard equipment (lawnmowers, rototillers, power generators and chain saws) and the service of small engines - pumps, snowblowers, outboard engines and others.

Both Appellants gave evidence as did the applicant. Counsel for the Municipality called the planning co-ordinator as his only witness. One area resident gave evidence opposed to the rezoning.

Elizabeth Schwartz has lived approximately 10 years on the Woodworth Road, which she described as an almost isolated neighbourhood approximately 4 miles south of the centre of Milford and about ½ mile north of Lantz. There are no large commercial outlets within approximately a half mile on either side of Highway 2 except for Canadian

National Gypsum across the (Shubenacadie) river and an Esso bulk plant to the north of Highway 2. She described the area of the Woodworth Road as one of the last havens unobstructed by commercial outlets. She believed that the R-4 Zone allowed non-disruptive businesses in keeping with a rural neighbourhood and questioned whether there had been any need to rezone the subject property if the business was to stay small and be non-disruptive. She objected to the size of the parcel of land rezoned (3.11 acres) which she felt was inappropriate for the area, and she expressed a strong preference for a separation of residential development and commercial development. The rezoning of the subject property was the first such rezoning for a commercial venture in this neighbourhood although a number of small businesses existed in the area and throughout the Milford "corridor" and were allowable land uses in the R-4 Zone. Future possible uses of the 3.11 acre subject property allowable in a commercial (C-1) zone could be disruptive to the existing rural-residential neighbourhood surrounding it she felt.

In cross-examination, Ms. Schwartz stated that she did not believe that the commercial rezoning of the subject property had increased the value of the property on which she lived, but rather had possibly decreased its value. She agreed that C-2 (Commercial Highway) zoning would be even more incompatible than C-1 with the area but she repeated that she felt that the R-4 zone should allow the commercial operation proposed by the applicant and failing that, a development agreement under C-1 guidelines would be acceptable to her. She stated that possible lack of enforcement of the C-1 Zone was an anxiety to her.

Mr. Elwin Woodworth, the Appellant, has lived all his life on a property of 100 acres more or less owned by Frederick Woodworth, his father. This property lies to the north of the Woodworth Road, parallel to it but without frontage on the road, and runs from the C.N.R. right-of-way on the west to the Shubenacadie River on the east and is accessed by a private drive from the north side of Woodworth Road. Elwin Woodworth owns a property of approximately 100 acres with extensive frontage on the south side of the Woodworth Road. He farms both properties.

Mr. Woodworth objected to the C-1 zoning of the subject property because he felt that it was not really necessary for the commercial use proposed, which he believed could be accommodated by the flexibility in the R-4 zoning. He expressed anxiety about the viability of "policing" a 3.11 acre lot zoned commercial to ensure adherence to the requirements of the C-1 zone. Mr. Woodworth was concerned that additional traffic on this road would lead to a further problem he has had in the past with people driving dirt bikes, snowmobiles and 4-wheel drive vehicles over his farmland.

Mr. Woodworth believed that the rezoning of the subject property would decrease the value of the property he owns on the south side of the Woodworth Road. He speculated that his land could be developed as a residential subdivision sometime in the future when sewer and water services became available "at the end of the road" (Highway 2 and the Woodworth Road), and a commercial lot "in the centre of it" would not make residential development too attractive. He confirmed that sewer and water services existed "within a mile on the Lantz side" and within 1½ - 2 miles to the north in Milford. He stated that he planned to farm the land as long as he was able.

In cross-examination Mr. Woodworth agreed that the intervening lands between his father's (Frederick Woodworth's) lands and the Woodworth Road are lands of Sidney Woodworth which have been residentially subdivided.

Asked more specifically about his intentions for subdivision of his land he agreed that he intended to continue farming it but that it was very possible in years to come that he might develop it also. He agreed that if sewer and water services were available it would be "very possible" that he would develop his land residentially.

He acknowledged that both his residence and his farmland were at least 200 feet further in the road past the commercially zoned subject property and that anyone driving in the Woodworth Road to the proposed commercial operation and back to Highway 2 would not cause traffic problems for him. In Mr. Woodworth's experience, however, "people like to drive around" and he felt that increased traffic anywhere on the road might produce increased traffic all along it.

At the conclusion of the Appellants' evidence, Counsel for the Municipality raised the issue of the status of the Appellants as "aggrieved persons". Section 63(1) of the Planning Act allows an appeal from "the amendment, revision or refusal by a council to amend or revise the Land-use By-law" by four categories of appellant: an aggrieved person, the applicant, the Director or the Council of an adjoining Municipality. Counsel for the Municipality contended that the Appellants in this case had not discharged the onus on them to prove that they were aggrieved persons and that the Board therefore did not have jurisdiction to hear the appeal on the merits. He further argued that if the Appellants had failed to establish prima facie that they were aggrieved, which he believed to be the case, then the Municipality should not have to present its evidence in rebuttal.

Counsel for the Municipality referred to criteria applied by the Board in previous decisions to determine the status of appellants as aggrieved persons and compared the evidence of the Appellants in this appeal to the requirements cited previously by the Board as necessary qualifications to establish aggrieved status.

The Board determined that it would not rule on the issue of the status of the Appellants without hearing additional evidence adduced by the Municipality. The

Board heard evidence from Bradford Hodgins, planning co-ordinator for the Municipality of the District of East Hants, from Anthony Fahey, applicant, and from Sheila Kelsey, a property owner whose land fronts on Highway 2 and extends eastwards to the C.N.R. right-of-way opposite a portion of the subject property.

On the issue of the status of the Appellants as aggrieved persons, a fundamental matter which must be determined before the merits of the appeal can be considered by the Board, the Board has considered the evidence of the parties, the argument of Counsel for the Municipality and the previous decisions of the Board dealing with this matter. The Board also visited the site and surrounding area.

The tests for status as an aggrieved person in appeals under the Planning Act first set out in the Board's decision on an appeal by Riverlake Residents Association (NSMB-448-84-P), prescribe that an appellant must prove that he has a legal grievance in the matter at issue or has been denied some personal or property right or had imposed upon him a burden or obligation. This criteria was expanded, on the basis of the definition of an aggrieved party in Black's Law Dictionary, in the Board's decision on an appeal by Douglas Benedict (NSMB-475-85-P) which included, in a definition of an aggrieved party, "one whose pecuniary interest is directly affected by a decree or judgment" and added that "the word 'aggrieved' refers to a substantial grievance".

In the Board's decision on an appeal by Fournier et al (NSMB-474-85-P) several appellants were qualified as aggrieved persons on the basis of evidence that established that their property was in proximity to the subject property and that they had "suffered pecuniarily" or had "sufficient pecuniary interest in the subject matter of the appeal".

In the Board's decision on an appeal by Northwest Arm Heritage Association (NSMB-496-85-P) the Board, as in Fournier, expressed the opinion that there is an onus on appellants to prove that they are aggrieved persons. In that decision neither the Association nor the individual appellants satisfied the Board that they had a legal grievance, or had been denied some personal or property rights, or had imposed on them a burden or obligation. Expert evidence by accredited appraisers that neither the proposed residential development nor the traffic generated by it would result in the devaluation of properties of the appellants was accepted by the Board as an indication that the appellants had not suffered a legal grievance.

In the Board's decision on appeal by Backman et al (NSMB-483-85-P), the same three-part test for an aggrieved person was applied, resulting in some abutting property owners being judged to be aggrieved not only because of their proximity but also because there was evidence that the proposed development would have an adverse or injurious effect on them, leading to devaluation of their properties, and therefore they had a legal grievance.

In the Board's decision on an appeal by Brown et al (NSMB-395-82-P), from a decision made under the former Planning Act but heard after the new Planning Act was in force, it was the opinion of the Board that the criteria of the former Planning Act applied. However, one of the Appellants, Mrs. Brown, was determined from the evidence to have status as an aggrieved person because her property was in close proximity to the subject which would result in her suffering pecuniarily from the proposed development.

In the Board's decision on a (second) appeal by Ruth Arenburg (NSMB-508-86-P) the Appellant was determined to have status as an aggrieved person because she believed that her property had been devalued and that she had suffered a pecuniary loss. Her opinion was preferred to an opposing opinion by an accredited appraiser and it was stated that "each person is an expert entitled to give admissable opinion evidence concerning the value of his own home and that valuation, once admitted in evidence, must be weighed together with all other evidence concerning valuation."

In the Board's decision on an appeal by the Village Commissioners of the Village of New Minas (NSMB-521-86-P) the Village was determined to be neither a person with corporate capacity to deal with planning matters, nor aggrieved, because there was insufficient evidence to show that it had suffered any pecuniary loss.

In a recent Board decision dealing with the issue of the appellant's status, on an appeal by Union, Meadowview, Bridge and Nottingham Residents' Association (NSMB-529-86-P), it was determined that the association was not an aggrieved person in its own right or as an agent of members who might be aggrieved or as an assignee of the rights to appeal by any aggrieved persons, although some of the area residents who were members of the association may have been aggrieved persons.

In the most recent decision by the Board, on an appeal by Shirley R. Ramey (NSMB-532-86-P) the Appellant was determined to be aggrieved because of the proximity of her property to the subject properties, the wide difference in allowable use and intensity of use between the subject properties and hers, and her belief that one or more of those uses would negatively affect the value of her property.

The preceeding summary reviews the tests applied by the Board to the evidence presented in a number of prior appeals on the issue of the status of the Appellants as aggrieved persons. The issue in this appeal is whether the Appellants have discharged the onus on them to prove that they are aggrieved persons in order to qualify as Appellants pursuant to Section 63(1) of the Planning Act.

If they have not, the Board has no jurisdiction to consider the merits of the appeal. If they have proved their status as aggrieved persons, the Board can assume jurisdiction to determine whether or not the decision by Council reasonably carried out the intent of the Municipal

Planning Strategy (M.P.S.).

Counsel for the Municipality argued that the Appellants had not been denied some personal or property right, suffered an economic loss, had imposed on them a burden or obligation or suffered a legal grievance. From the evidence of the Appellants, the Board cannot agree.

Mr. Woodworth, whose parcel of land is approximately 200 feet beyond and on the opposite side of the Woodworth Road from the subject property, said that he believed that the rezoning would decrease the value of his property particularly with regard to its future capability to be developed as a residential subdivision. He expressed the intention to develop his farmland residentially when he was unable to continue farming or when extensions of municipal sewer and water services made it feasible. He believed that the commercial zoning of a 3.11 acre parcel of land on a small rural road with existing residential and farming development would not be a compatible use because of the scale of the commercial property and because of other less acceptable commercial uses allowable in the C-1 Zone.

Mr. Woodworth was concerned about increased traffic on the road because of a commercial operation on the subject property. He anticipated that traffic destined for the proposed commercial operation would continue beyond it to explore the remainder of the dead-end Woodworth Road and could cause damage by trespassing on his property which lies just 200 feet beyond it on the Woodworth Road. He has had experience in the past with trespassing problems from owners of snowmobiles, all-terrain vehicles and dirt bikes on his farmland.

Ms. Schwartz felt that the commercial rezoning of the subject property could possibly decrease the value of the property on which she lives. Mr. Woodworth said that he believed that the rezoning would decrease the value of his property for its residential subdivision capability.

Although the stated intended commercial use of the subject property is the development of a 1000 square foot building to be used for small engine and power equipment sales and service, the permitted uses in the C-1 Zone include the following:

> "CI USES PERMITTED
>
> 1. No development permit shall be issued in the Commercial General (Cl) Zone except for one or more of the following uses:
>
> a) Existing Residential or Special Use Land Uses;
>
> b) Retail Trade Establishments
> Retailing food, beverages and drugs.
> Retailing shoes, apparel, fabric and yarns.
> Retailing household furnishings, appliances and furniture.
>
> General retail merchandising.
> Other retail stores: book and stationary stores; florists and garden stores; hardware, paint, glass and wallpaper stores; sporting goods and bicycle shops; musical instrument and record stores; jewellery stores; watch and jewellery repair shops; camera and photographic supply stores; toy, hobby and souvenir shops.
>
> Retailing establishments dealing in second-hand goods, optical goods, artists' supplies, luggage and leather goods, tombstones, pets,

coins, stamps, newspaper and magazine shops tobacconists.

Non-Store Retailing; vending machine operators including coin-operated amusement services and self-service laundries or dry cleaners; direct seller businesses engaged in retailing a variety of products.

c) Finance, Insurance and Real Estate Establishments.

d) Business Services Establishments including accounting, lawyer and notary services.

e) Private Instruction services including driving schools, language schools, dance schools, etc.

f) Non-Institutional Health and Social Services, including; ambulance services, private medical health clinics, private practice offices of physicians and surgeons, specialists, dentists and other health practitioners; not commercial day-care centers or pre-schools.

g) Accommodation, Food and Beverage Services Establishments.

Accommodation services; Hotel, Motel, Tourist Inns, Food and Beverage Services; restaurants, caterers, taverns, cabarets.

h) Amusement and Recreation Services; motion picture theatres, video distribution, marinas, bowling alleys, billiard halls, coin-operated amusement arcades, but excluding race tracks.

i) Personal and Household Services; barber shops, funeral services, laundries and cleaners.

j) Other Services Establishments; equipment rentals, offshore services, photographers, repair services, services to dwellings and buildings, travel services, welding and auto rental services.

2. Government, Utility, Community Services, Parks, Private Clubs and Fraternal Organizations, subject to the Special Use (02) Zone requirements. Conversions of buildings to special use activities subject to the 02 zone requirements.

3. Residential Dwelling Units in same building as ground floor commercial use subject to the General Residential Single and Two Family R2 Zone requirements if there are up to 2 dwelling units, and subject to the Village Residential Multiple Family R-3 Zone requirements if there are more than 2 dwelling units in same building.

In the opinion of the Board, the concerns expressed by both Appellants about impact of the commercial rezoning of the subject property on the value of Mr. Woodworth's property and the property on which they live are legitimate given the permitted uses in the C-1 Zone, the size of the area rezoned, and the existing rural and residential nature of the area of the Woodworth Road. The Board believes that the Appellants are aggrieved persons. Mr. Woodworth's pecuniary interest has been affected by the rezoning of the subject property. The proximity of Mr. Woodworth's property to the subject, a distance of 200 feet, is sufficiently close in a rural area to cause an injurious effect.

The evidence of Bradford Hodgins, Planning Co-Ordinator with the Municipality of the District of East Hants since June 1983, covered the processing of the application for the rezoning of the subject property, and the policies of the M.P.S. and requirements of the Land-Use By-law which he considered applicable to the application. Mr. Hodgins was involved in the preparation and eventual approval of the Municipality's M.P.S. and Land-Use By-law. He was the author of staff reports to the Planning Advisory Committee (P.A.C.) and Council which recommended approval of the application for rezoning of the subject property made by

Mr. Fahey. He had visited the property on several occasions although he had not travelled to the end of the Woodworth Road. The distances set out in the staff report on this application were calculated on road distances.

Mr. Hodgins cited Policies P2-4, P4-22 and P9-1 as M.P.S. policies relevant to the rezoning application under appeal. Policy P2-4 sets out the future land use for District 3 Milford, as follows (in part):

> "P2-4 ...
>
> 2) RURAL RESIDENTIAL AND NATURAL RESOURCE:
> To designate lands, not identified for future serviced residential growth, rural areas of natural resource (farming) activity and areas with a widely dispursed and mixed settlement pattern. Existing commercial uses will be considered as permitted within the designation as listed in Land Use By-law Appendix 2-C. The (R4) zone corresponds to this designation which permits a broad range of uses compatible with the rural lifestyle.
>
> 3) COMMERCIAL:
> The designation is applied to existing commercial uses shown on Gen. FLUM 3(2a) and appropriate commercial zoning carries through the intent of continued use. The designation at the junction of Highways 2 and 214 includes residential uses which are zoned residential (R2). The future intention is to permit a commercial land use focus at this junction with the transition of the residential uses accomplished by zoning amendment."

Policy P4-22 sets out the rezoning procedure to be used to enable proposed commercial uses to become established in the R-4 Zone as follows:

> "P4-22
> It shall be the intention of Council to permit within the 'Rural Residential and Natural Resource' Gen. FLUM designation and the Rural Residential and Natural Resource (R4) Zone, existing commercial uses which exceed the (R4) Zone requirements, by zoning said uses (C1) or (C2) within Land-Use

By-law Appendix 2-C. New commercial uses within this Gen. FLUM designation and in excess of the (R4) zone requirements shall be permitted to be included in Appendix 2-C by amendment as an addition to Land-Use By-law, Appendix 2-C and these proposed and existing commercial uses shall be subject to satisfying the following criteria:

a) Existing commercial uses may continue operations, change use within an allocated commercial zone class and expand commercial use subject to satisfying the allocated zone class requirements such as applicable yards, frontages and lot area;

b) Proposed commercial uses not conforming to the (R4) zone requirements and subject to amendment for inclusion to Appendix 2-C, shall not include Commercial Shopping Centre developments, and are subject to satisfying the applicable Commercial General (C1) and Commercial Highway (C2) zone class requirements."

Policy P9-1 sets out the general rezoning criteria as follows:

"P9-1
Therefore, it shall be a policy of Council to: in considering amendments (rezonings) to the Land-Use By-law, in addition to all other criteria as set out in the policies of this Planning Strategy, Council shall have regard to the following matters:

a) That the proposed development is in conformance with the intents of this Strategy and with the requirements of all other Municipal By-laws and regulations;

b) That the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Municipality to absorb any costs relating to the development;

ii) the adequacy of municipally approved sewer and water services and utilities or if services are not provided, the adequacy of physical site conditions for private on-site septic and water systems;

iii) the adequacy and proximity of school, recreation, and any other community facilities;

iv) the potential for significantly reducing the continuation of agricultural land uses;

v) the adequacy of road networks in, adjacent to, or leading to the development;

vi) the potential for the contamination of watercourses or the creation of erosion or sedimentation;

vii) creating a leap-frog, scattered or ribbon development pattern as opposed to compact development.

c) That the proposed development is in compliance with the following matters in the Land-Use By-law:

i) type of use;

ii) emissions including air and water pollutants and noise;

iii) height, bulk, and lot coverage of the proposed building;

iv) traffic generation, access to and egress from the site, and parking;

v) open storage;

vi) signs;

vii) similar matters of planning concern.

d) Suitability of the proposed site in terms of the environmental features of the site, particularly susceptability to flooding and other nuisance factors and where applicable comments from the Department of Environment concerning the suitability of the site for development;

e) Provision for buffering, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

In applying the rezoning criteria set out in Policy P9-1 to the application in question, Mr. Hodgins' comments are contained in his Planning Report and Recommendation presented to P.A.C. February 25, 1986, and to Council March 5, 1986, contained in Exhibit W-3, as follows:

> "a) Proposed development is in conformance with the policies of the Strategy and is capable of satisfying the requirements of the Commercial General (C1) Zone. The status of the property described as Lot J is such that it was created by deed, June 1985, and not be a registered approved plan of subdivision.
>
> b) The large land area is well in excess of the minimum on-site septic system lot are requirements and there are no water courses or other sensitive environmental features evidence on the site.
>
> c) The proposed development sited on the property as shown on the site plan, is capable of satisfying the setback and minimum yard requirements of the Land-Use By-law. Some concern has been expressed concerning the range of business activities permitted within the Commercial General (C1) Zone, particularly the sales and repair of motor vehicles. Automotive Vehicles, retail, parts and accessories, sales and service (Major Group 63-S.I.C.) is specifically not a permitted use within the (C1) Zone, rather is within the permitted Commercial Highway (C2) Uses. The applicant is aware of this distinction, and in any event, the main activity is lawn mowers and yard equipment sales and repair.
>
> d) environmental suitability of site is not of concern.
>
> e) The site is immediately adjacent the CNR right-of-way. Frontage is on the Woodworth Road and the nearest neighbouring residence is a mobile home 990 feet (.3 kil) southeast towards the Shubenacadie River. Beyond that point, 2145 feet (.65 kil) from the development is a farm residence at the end of the public road. Another farm residence is located off the Woodworth Road running easterly. There is no apparent incompatibility with the development and the neighbouring land uses and in fact, the site is quite isolated from any residential uses."

In cross-examination Mr. Hodgins agreed that Council's decision had been a spot rezoning but he felt that it was consistent with a rural area. He explained that a business proposed for the subject property could have been allowed as of right if it had complied with the requirements of the R-4 Zone. In his opinion the business proposed by the applicant did not comply with the requirements of the R-4 Zone because of its retail aspects and so a rezoning to C-1 was necessary.

Mr. Hodgins had not considered a smaller parcel of land for rezoning because it was felt that Department of Health approval for an on-site sewage disposal system might be required in future which might necessitate a lot size larger than the current minimum size of 20,000 square feet. It was not uncommon for lots to be 80,000 square feet in size in order to receive Health Department approval. Even if the use proposed had been allowable in the R-4 Zone, Mr. Hodgins had been concerned that a 1000 square foot maximum building size would be a limitation on the applicant's future development which could not be exceeded without rezoning.

Mr. Hodgins recalculated the number of dwellings in proximity to the subject property on an overlay (Exhibit W-4) to an L.R.I.S. map of the area in question. Using concentric circles based on the centre of the subject property, he established that there were 7 properties and 1 dwelling within a 500 foot radius, 16 properties and 2 dwellings within an 800 foot radius, 28 properties and 11 dwellings within a 1000 foot radius, and 44 properties and 27 dwellings within a 1500 foot radius.

Anthony Fahey applicant, stated that he had owned the subject property for approximately a year. If his proposed business is successful he would not want to be restricted to a maximum building size of 1000 square feet as had been indicated to him when he applied for a development permit. He felt that the number of residential subdivisions in the area indicated a growing market for the services he would be offering. He said that noise concerns raised at Council's public hearing were irrelevant given the existing train traffic, and the noise associated with the operation of the gypsum plant and the Esso Bulk Plant in the area. He felt that C-1 zoning was appropriate for his proposed business and would allow him to expand operations if necessary.

Sheila Kelsey who has owned two lots fronting on the east side of Highway 2 and running back to the CNR tracks within an 800 foot radius of the subject property since July, 1985, spoke against the rezoning of the subject property to C-1. She expressed concern that the rezoning of the subject property would reduce her property value, that a subsequent owner of the property could operate any of a wide range of businesses allowable in a C-1 Zone and that there is already a small engine business in nearby Lantz.

The Board heard oral argument from the parties at the conclusion of the hearing. The Board has considered the evidence and argument presented at the hearing in the light of Sections 63(3) and (5) of the Planning Act which state:

> "63(3)
>
> The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.
>
> ....
>
> 63(5)
>
> The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The policies of the Municipal Planning Strategy (M.P.S.) which the Board must consider are contained in a document entitled "The Corridor Districts and Mount Uniacke District Integrated Planning Strategy of the Municipality of East Hants", approved by the Minister April 30, 1985. The M.P.S. applies to six out of thirteen polling districts in the Municipality, one of which is District 3 Milford where the subject property is located. The "Corridor Districts and Mount Uniacke District Integrated Land-Use By-law" is "the principal means for carrying out statements of policy with respect to the control of land use and development". The Generalized Future Land Use Maps (FLUM) constitute a legal part of the M.P.S. Each district has an individual FLUM.

The FLUM designation Rural Residential and Natural Resource is described in the M.P.S. as follows:

> "The designation is applied to large land areas where the settlement pattern is widely dispursed and mixed, areas not identified for future residential concentrations, or areas of natural resource lands that are inaccessible. The corresponding zone designation is the Rural Residential and Natural Resource (R4) Zone which permits a range

> of uses traditionally associated and compatible with the rural lifestyle."

The FLUM commercial designation is described as follows:

> "The designation provides for the continuation of a broad range of existing commercial land uses within established village cores, radiating along major collectors and arterials from these cores, and also interspersed along major roads in the semi-urban areas. Corresponding commercial zones carry through the intent of the future land use commercial designation which is to encourage the continuation of the commercial development. The Commercial General (C1) Zone designation in some village centres contains existing residential uses that are enabled to convert to permitted commercial uses without rezoning.
>
> To encourage the future development of established commercial focal points. The corresponding zone designations are commercial where a previous commercial rezoning has occurred. However, the zone application in most cases reflects the existing land uses, which are predominantly residential and the transition to commercial land uses is done through a zoning amendment.
>
> The designation is applied to several land parcels located adjacent to major highway junctions or highway interchanges where the preferred future land use is commercial, capitalizing upon favourable access to large market areas. The corresponding zone generally reflects existing land use and the transition is accomplished through zoning amendment."

According to the applicable FLUM for District 3 Milford, the lands in the area of the Woodworth Road are all designated Rural Residential and Natural Resource and zoned correspondingly R-4. The only lands which were non-commercial in use or vacant and which were designated Commercial on the District 3 FLUM are in the area of the junction of Highways 2 and 14.

The specific commercial policies in the M.P.S.

dealing with commercial land uses in the Rural Residential and Natural Resource Designation are preceded by a preamble which states:

> "Many commercial land uses are naturally associated with rural areas, most typically natural resource businesses related to the extraction of aggregates and minerals, logging and sawmills, farming, general contracting and trucking. As the planning area develops, densities and market demands will increase and inevitably the rural areas will attract more varied commercial development. While Council is encouraging commercial development to take place within the planning area, it is not Council's intention to permit indiscriminant commercial development of the rural landscape.
>
> Policy P4-21 states:
>
> "It shall be a policy of Council to permit within the Gen. FLUM designation 'Rural Residential and Natural Resource' and the Rural Residential and Natural Resource (R4) Zone, limited businesses uses in association with a residential lot, and Commercial Local (C3) uses which do not negatively impact upon the rural residential character of the area.

This Policy which allows limited business uses in association with a residential lot, was described by the Municipality's Planner, Mr. Hodgins, as increasing the flexibility to consider Mr. Fahey's application for a development permit for his proposed business use. According to Mr. Hodgins, Mr. Fahey's proposal fits the circumstances described in Policy P4-21.

Notwithstanding Mr. Hodgins' initial conclusion that the commercial use proposed by the applicant could be covered by Policy P4-21, and so allowable within the existing R-4 Zone, Mr. Hodgins further evaluated the proposed commercial use against the R-4 permitted land uses set out in the Land-Use By-law. He then determined that Mr. Fahey's proposed use could not be allowed in the R-4 Zone. Mr. Hodgins came to this conclusion after considering Section 10 of the R-4 Zone requirements which deals with "business, professional and home occupations permitted in the R-4 Zone". Section 10 sets out two permitted uses as additional to those outlined in Part 8, Section 3(a) and (b) in the Land-Use By-law contained in a section setting out general provisions for residential zones. Part 8, Section 3(a) and (b) have been previously quoted. Mr. Hodgins concluded from an examination of Section 3(b) that the absence of any reference to retailing or sales would eliminate favourable consideration of Mr. Fahey's proposal. He agreed on cross-examination however, that it was quite possible to come to the opposite conclusion in the interpretation of Section 3(b). Mr. Hodgins having concluded that the business proposed did not correspond with the list of allowable Home Occupational uses permitted in the R-4 Zone, he identified a further concern in the maximum size of an area to be used for such a business (1000 square feet). Both he and the applicant felt this 1000 square foot limit might be unduly restrictive to the future development of Mr. Fahey's proposed business.

The Board understands from the evidence presented at the hearing, and from the staff report to PAC and Council together with Minutes compiled in Exhibit W-3, that the original application by Mr. Fahey was not for the rezoning of "Lot 'J'" from R-4 to C-1, but for a development permit to construct a 1000 square foot building for the repair and sale of small engine and power equipment. The decision that such a use was not permitted in the existing R-4 zoning of the subject property appears to have been made initially by Municipal staff, whereupon the applicant duly applied for rezoning. With respect the Board is not convinced that the business proposed by the applicant is not an allowable Home Occupation in an R-4 Zone. If indeed the applicant was originally agreeable to the approval of a building 1000 square feet in size as sufficient to house his proposed business, such an approval would have been acceptable to the Appellants according to their evidence.

The issue before the Board however is whether Council's approval of the rezoning of the subject property from R-4 to C-1 reasonably carries out the intent of the M.P.S.

The preamble of the section of the M.P.S. setting out commercial Land-Use policies clearly expresses support for commercial development in the Municipality, and more particularly for "small business growth". Businesses operated from or in conjunction with a residence are recognized as a pattern which should continue to be permitted "subject to size limitations and other specific criteria". The growth of "specialty retail and services businesses" is anticipated at "business focal points" and "commercial cores". The intent of the policies of the Commercial section of the M.P.S. is summarized as follows:

> "Council's objective in this Strategy section is to encourage business development to take place in an unfettered, locally supportive manner, with particular regard for the community context of this development (avoidance of land use conflicts, appropriateness of site location within the community, aesthetically acceptable development and adequate on-site parking)."

The Municipality's M.P.S. policies and related sections of the Land-Use By-law distinguish between commercial uses which require commercial zoning and those which are permitted as Home Occupations in an R-4 Zone. Policy P4-22 applies to this application because (1) the application is for a new commercial use; (2) the subject property is in an area designated Rural Residential and Natural Resource and Zoned R-4; and (3) the proposed use has been deemed to be in excess of the R-4 zone requirements. Policy P4-22, subsection (b) states:

> "Proposed commercial uses not conforming to the (R4) zone requirements and subject to amendment for inclusion to Appendix 2-C, shall not include Commercial Shopping Centre developments, and are subject to satisfying the applicable Commercial General (C1) and Commercial Highway (C2) zone class requirements.

The application conforms to the C-1 zone requirements which are:

> "Where Municipally approved central sanitary sewer and water services are not available, no development permit shall be issued, except in conformity with the following requirements:

Minimum Lot Area:	20,000 square feet
Minimum Lot Frontage:	100 feet
Minimum Front Yard:	35 feet
Minimum Side Yards:	
(i one side)	10 feet
(ii other side)	14 feet

Minimum Rear Yard:	3 feet
Maximum Height of Main Building:	35 feet
Maximum Floor Area	15,000 square feet
Parking Requirements:	As provided in Part 6, Section 21."

The report of the Planner Mr. Hodgins concludes that "[the] proposed development is in conformance with the policies of the Strategy and is capable of satisfying the requirements of the Commercial General (C-1) Zone". The Board agrees that the proposed business can satisfy the requirements of the C-1 Zone but cannot agree that the proposed development is in conformance with the M.P.S. policies, or that the commercial rezoning of a 3.11 acre parcel of land on a small by-road in an area designated and zoned for rural residential and natural resource uses carries out the intent of the M.P.S.

The Board believes that the business proposed by the applicant meets the criteria set out in Policy P4-21, being a limited business use in association with a residential lot, which will not negatively impact on the rural residential character of the area. Both the Appellants and the Planner concur.

The size of a development allowable within an R-4 Zone or allowable only in a commercial zone can be gleaned only by reading both the M.P.S. and the Land-Use By-law together. In simple terms, a commercial land use to a maximum floor area of 1000 square feet may be allowable in an R-4 Zone. Commercial land uses between 1000 square feet and 15,000 square feet in floor area are allowable in C-1, C-2 and C-3 Zones.

The objective of the commercial policies of the M.P.S. previously quoted, is to encourage business development "with particular regard for the community context" of the development. This is explained as "avoidance of land use conflicts, appropriateness of site location within the community, aesthetically acceptable development and adequate and adequate on-site parking". The Board does not believe that a commercial rezoning of the subject property which would allow a wide variety of commercial uses, to a maximum floor area size of 15,000 square feet to be located on a small rural by-road where the existing land uses are entirely residential and farming contributes to the avoidance of land use conflicts or is an appropriate site location within the community.

If the allowable commercial uses in an R-4 Zone are to be narrowly interpreted as has been the case in this application, and if the 1000 square foot floor area maximum operative for business, professional and home occupation uses permitted in the R-4 Zone is deemed to be too restrictive for proposed new businesses which could eventually need to expand beyond that limit, then the Board believes that the flexibility intended to be the prime characteristic of the R-4 Zone will have been lost.

The Board accepts that the intent of the Rural Residential and Natural Resource land use designation and the R-4 Zone is to permit compatible land uses consistent with the traditional mixed use character of a rural environment. While the business proposed by the applicant is compatible in nature with the area for which it is proposed, its potential scale permitted by the size of the subject property as well as by the Commercial C-1 Zoning is not compatible. In addition, some permitted uses in the C-1 Zone would be quite incompatible with the area in which the subject property is located, but could be developed as-of-right.

The Board accordingly determines that the Appellants have discharged the onus on them to prove that Council's decision to rezone the subject property from R-4 to C-1 did not reasonably carry out the intent of the M.P.S.

Pursuant to Section 63(4)(b) of the Planning Act the Board allows the appeal and reverses the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 27th day of February, A.D., 1987.

E. Salton

ELIZABETH SALTON
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Finlayson v. Town of Sydney Mines

PLANNING--ZONING AMENDMENT--APPROVAL OF REZONING FROM R-1 TO C-1--WHETHER AGGRIEVED PERSON--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--MUNICIPAL BOARD ACT, SS. 16(1), 29--PLANNING ACT, SS. 51(2), 60(3), 63(1), (2),(3),(4),(5)--TOWN OF SYDNEY MINES MPS, POLICIES H-6, H-14

This is an appeal by G.S.F. as an aggrieved person from a decision of the Council of the Town of Sydney Mines rezoning a house-size lot on Pond St. from Residential (R-1) to Downtown Commercial (C-1). The lot is adjacent to lands zoned C-1 and occupied by a Sobey's supermarket. The purpose of the application is to allow the subject land to be used as an addition to the supermarket's parking lot and to provide additional access to the supermarket from Pond St. The Appellant resides opposite the subject land on Pond St. in a single family house on a lot zoned R-1. The planner from the Metropolitan Planning Commission recommended against the rezoning. A Municipal Planning Strategy (MPS) covers the subject area.

HELD: The Board allows the appeal and reverses the decision of Council.

The Appellant is an aggrieved person. The uncontradicted evidence of the Appellant and the planner from the Metropolitan Planning Commission is that the rezoning caused some diminution in value of the Appellant's house.

The Board accepts that the Town is in need of economic expansion and notes that the MPS favours economic expansion. However, the uses permitted by the proposed rezoning would be potentially incompatible with the adjacent residential land uses. This potential incompatibility cannot be controlled by the existing by-laws controlling the C-1 zone. Therefore, Council in its decision has made no adequate provision to meet the intent of the MPS for buffering, landscaping and screening as is contemplated by Policy H-6(e). The Board must find that the decision of Council cannot reasonably be said to carry out the intent of the MPS.

NSMB-559-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **GERTRUDE S. FINLAYSON** from the decision of the Town Council of the TOWN OF SYDNEY MINES made on October 14, 1986, to amend the Town's Land-Use By-law by rezoning certain lands situated on Pond Street, Sydney Mines to be purchased by Food City Limited from one Anthony and also known as Site A from Residential (R-1) to Downtown Commercial (C-1).

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: MATTHEW RYAN, LL.B., on behalf of the Appellant, GERTRUDE S. FINLAYSON;

WILLIAM P. BURCHELL, LL.B., on behalf of the TOWN OF SYDNEY MINES.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board Member, Richard L. Weldon, to hear this planning appeal at the Board's March 18, 1987, sittings at the Council Chambers of the Town of Sydney Mines, 112 Main Street, Sydney Mines, Nova Scotia. [The Town of Sydney Mines will hereinafter be referred to as the Town].

The Notice of Appeal, accompanied by an undertaking made on behalf of the Appellant to pay for the advertising costs for advertising the Notice of Hearing, was dated November 5, 1986, and was served on the Board on November 6, 1986. The Board assigned the Chairman to peruse this Notice of Appeal to determine whether or not the Notice of Appeal complied with the Planning Act, S.N.S., 1983, Chapter 9, and the Rules made thereunder as to the form and content of an appropriate Notice of Appeal. The Chairman made no request to the Appellants to amend the Notice of Appeal.

The Notice of Appeal cited as the basis of the appeal s. 63 of the Planning Act.

The Appeal seeks to have the Board reverse the decision of the Town Council of the Town of Sydney Mines (hereinafter referred to as the Council) made on October 14, 1986, to amend the Town's Land-Use By-law by rezoning certain lands situated on Pond Street, Sydney Mines to be purchased by Food City Limited from one Anthony and also known as Site "A" from Residential (R-1) to Downtown Commercial (C-1).

The appeal came on for hearing at 10:00 a.m. on March 18, 1987, at Council Chambers of the Town of Sydney Mines, 112 Main Street, Sydney Mines, Nova Scotia, pursuant to the Notice of Hearing dated the 16th day of February, 1987. The Board heard evidence, then took a view of the site after the 12:55 p.m. adjournment of the hearing.

Service of the Notice of Hearing, and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board. All parties represented agreed that all procedural requirements for the Board to take jurisdiction had been accomplished within the times prescribed by law. All parties represented at the hearing agreed to hear in the same continuous hearing all the available evidence both as to the status of the Appellant as an "aggrieved person" and as to the merits of the appeal.

These excerpts from Planning Act sections bearing on this appeal bear quoting here:

> "63(1) The amendment, ...by a council [of] ... the land-use by-law may be appealed by
>
> (a) an aggrieved person;
>
> (2) An appeal filed pursuant to subsection (1) shall be served on the Board within twenty-one days of the date of the publication of the advertisement required under subsection (3) of Section 60 ... .
>
> (3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.
>
> (4) The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending ... the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the Board determines that the decision of council cannot reasonably be said to carry out the intent of the municipal planning strategy.
>
> ....
>
> 60(3) Upon the passing of a by-law amending a land-use by-law, the council shall give notice of its passing by an advertisement in a newspaper circulating in the area affected ... ."

The land rezoned by the decision of the Town Council (hereinafter referred to as the subject land) is a typical house-size lot situate on the East side of Pond Street in the Town and is shown on Exhibit F-10 (an extract from an L.R.I.S. Map) as property number 1518296. This lot is almost rectangular in shape and extends Eastwardly from Pond Street to a larger lot partially shown on the same Exhibit as 15188634. This larger lot along with other lots is occupied by a Sobey's supermarket which presently obtains its main vehicular access to a street other than Pond. The subject land, prior to the Council's decision, was rezoned Residential (R-1) and the Sobey's lots were zoned Downtown Commercial (C-1). The stated purpose of the rezoning application is to make the subject land the same zone as the Sobey's lots so that the subject land may be purchased by Food City Limited and used as an addition to the supermarket's parking lot and to provide additional access to the supermarket to and from Pond Street.

As an additional prerequisite to its jurisdiction the Board must determine whether or not the Appellant is an aggrieved person within the meaning of s. 63(1)(a) of the Planning Act. The evidence shows that the Appellant Gertrude S. Finlayson lives in her own single family house, on a conventional size lot on the West side of Pond Street opposite the subject land. Her lot is zoned R-1. She stated that the rezoning complained of reduced the sale value of her house. She complained that the rezoning would increase traffic on her street which was already quite busy. John David Maxwell, a homeowner at 1 Prince Edward Street, and a close neighbour of the Appellant testified that the value of his house was reduced to some extent by the effect of the rezoning decision complained of. Malcolm Gregory Gillis, a planner from the Metropolitan Planning Commission, stated that in his opinion the rezoning decision would cause some diminution in the value of the Appellant's home. The evidence of Mr. Maxwell concerning the value of his own home is, of course, no direct evidence of the diminution of value of the Appellant's home but his evidence on this point together with the close proximity of his house to the Appellant's home is some corroboration to her evidence of diminution of value of her home. The proximity of the Appellant's home to the subject property also increases the likelihood that the rezoning decision complained of would result in the diminishment, to some extent, of the value of the Appellant's home. This evidence of some diminution of value in the Appellant's home was not contradicted by any other evidence so the Board finds that, as a result of the rezoning decision, the Appellant suffered some diminution in the value of her home. Woodworth and Schwartz v. The District of East Hants NSMB-515-86-P a recent Board decision lists many of the decisions in which the Board was previously called upon to determine the meaning of "aggrieved person". Having regard to that decision, from the facts enumerated above the Board finds that the Appellant, as a result of Council's decision, suffered a diminution in the value of her home which amounted in the circumstances to a legal grievance and is therefore an aggrieved person within the meaning of s. 63(1)(a) of the Planning Act. The Board therefore assumed jurisdiction to hear this appeal.

The Appellant gave evidence herself and called as witnesses, John David Maxwell and Malcolm Gregory Gillis. The Town called no witnesses. Blanche Boutilier, Joseph H. MacKinnon, and Madeline Anthony came from the audience and were sworn and gave evidence. In addition to the remarks attributed to her previously in this decision, Mrs. Finlayson stated that she had not participated in the proceedings before Town Council concerning the decision complained of because, at the time those proceedings were current, she was in a distraught condition because of the recent death of her husband and was not able to look after her affairs as well as she could have. She had experience with what could be done within a C-1 Zone because a tavern was located immediately adjacent to her house in a C-1 Zone with disastrous results to her enjoyment of her property and she didn't want that type of use to be made possible just across the street. Mrs. Finlayson said that she felt the increased traffic onto Pond Street from the Sobey's parking lot would be harmful.

Mr. John David Maxwell, from his slightly different perspective, testified in the same vein as Mrs. Finlayson.

Malcolm Gregory Gillis, a planner from the Metropolitan Planning Commission, the person responsible to advise Town Council on the subject rezoning application was qualified before the Board to give expert opinion evidence on matters of planning as they affect the Town. His report to Council dated August 21, 1986, was brought before the Board as Exhibit F-13. At that time, Mr. Gillis recommended against the proposed rezoning.

Some selective quotations from this report help in the understanding of his recommendations:

> "...Ms. Anthony's property is presently zoned R-1 simply because low density residential development is the predominant land use fronting on this sector of Pond Street. Single family homes exist on both sides of Anthony's lot and directly across the street. This neighbourhood is also in proximity to the Downtown core. Both a tavern and a multi-use commercial building are within ... 200' ... and the busiest intersection of the Downtown area is less than ... 400'. ...
>
> While Sobey's proposes only to place a parking lot on ... [the subject] property, extending the Downtown Commercial Zone to include this lot legalizes a wide variety of general commercial development on the lot, another access to their property and legitimizes further zoning amendment applications from ... R-1 ... to C-1 within the immediate neighbourhood. ...
>
> If expansion of the Downtown is to occur, this is a logical extension along a main collector street leading directly to the northwest of town.
>
> This proposal... has its merits. However, Section 51(2) of the Planning Act states that a Land Use By-law amendment must carry out the intent of the Municipal Planning Strategy. The Downtown Commercial (C-1) Zone boundary is almost identical to the boundary of the Central Business District in the Municipal Planning Strategy. An extension of ... C-1 ... to include both the remainder of Food City's property and Ms. Anthony's would be outside the designated boundary of the Central Business District designation on the Planning Strategy Map, [should be a.] Policy H-14 of the Planning Strategy permits expansion of ... C-1 ... into areas immediately adjacent ... provided all other policies of the Planning Strategy are not violated. Policy H-6 defines the criteria to be considered when evaluating an amendment to the Land Use By-law. ...
>
> E. There is [sic] provisions for buffering in the C-1 Zone requiring a building setback of ... 15' from any Residential Zone. ... there is no provision for landscaping or screening. ... Staff is compelled to advise Council according to strict adherence of the Planning Strategy. The criteria to be considered when reviewing a rezoning proposal are designed to alleviate any possible conflict with abutting residential uses. Since the C-1 Zone has no provisions for

> screening or landscaping, rezoning of this site to C-1 would not be strictly complying with all of the policies in the Planning Strategy. ...
>
> The staff ... recommend against this rezoning and suggests the Council consider other alternatives to rezoning this site."

At this hearing, Mr. Gillis still held the opinion that the decision of Council complained of was not within the intent of the Town's Municipal Planning Strategy (MPS) as dealt with by Section 51(2) of the Planning Act. He expressed the further opinion that the decision of Council complained of does not reasonably carry out the intent of the MPS within the meaning of s. 63(3) of the Planning Act and that the Board should allow the appeal under s. 63(5) of the same act.

Blanche Boutilier of 7 Prince Edward Street gave evidence on her own behalf. She became interested in the Board proceedings when she received, as an assessed owner in the neighbourhood, her Notice of Hearing in the mail. She supported the decision of Council since the decision would have various beneficial effects including the easing of traffic from Prince Edward Street, the clearning up of the long standing unsightliness of the subject property. She felt the rezoning would not make much difference to her.

On his own behalf, Joseph MacKinnon gave evidence that the project authorized by the rezoning decision would benefit the depressed economy of the Town and ease the traffic conditions on his street (Prince Edward Street). He was in favour of the decision appealed herein.

Madeline Anthony, 186 Main Street, Sydney Mines, also gave evidence on her own behalf. She said she acquired the subject lands by inheritance, that after the death of certain male relatives she had caused the dilapidated buildings to be razed and that she had conditionally sold the subject properties to Sobey's for addition to its parking lot - the condition being the successful rezoning of the subject property to C-1.

At the conclusion of the evidence counsel for the Appellant and counsel for the Town made verbal argument and then the Board, Clerk, the two counsel and the planner (by consent) took a view and the Board reserved its decision.

Mr. Gillis in his testimony and in his report stated that Council must make sure that, in amending a Land-Use By-law, it proceed in strict adherence to the MPS. Mr. Burchell, in his argument, contended that a general adherence to the intent of the MPS was all that was required of Council when it was amending a Land-Use By-law, that Council acting unanimously had done all that was necessary in his case to fall within the intent of the MPS. The Board can find no provision in the MPS, the Land-use By-law, or the Planning Act which call for a "strict" adherence to the MPS: adherence to the intent of the MPS on the part of the Council while amending a Land-Use By-law is called for by s. 51(2) of the Planning Act.

According to Mr. Gillis, Council, when dealing with a rezoning application in the Town, must look to the MPS and interpret the application to rezone in the context of the MPS. In regard to this particular application Mr. Gillis followed this procedure and concluded there were problems between the proposal and the following portions of the MPS:

> "Criteria for Amendment to the Zoning By-law
>
> (H-6) In considering amendments to the Zoning By-law, in addition to all other criteria set out in various policies of this plan, Council shall have regard to the following criteria: ...
>
> > (e) that there is provision for buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

In order to determine the buffering provisions in the proposed zone Mr. Gillis had regard to the Town's Land-Use By-law.

> "PART 12 COMMERCIAL DOWNTOWN (C-1) ZONE
>
> ...
>
> C-1 ZONE REQUIREMENTS
>
> 2. In a... C-1 Zone no development permit shall be issued except in conformity with the following requirements:
>
> > (c) Where a side lot line abuts a Residential Zone, the setback from the said side lot line shall be a minimum of ... 15 ...feet."

According to Mr. Gillis, this was the only control contained in the Zoning By-law which might serve as a control to ensure that the provisions of the proposed amendment would address the requirements of Section H-6(e) of the Town's MPS. Buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent land uses were just not provided for in the By-law controlling the proposed zone and the permissible uses in the proposed zone were potentially likely to be incompatible with the present residential uses in the adjacent residential zone.

The Board notes that the evidence discloses that the council decision in favour of the rezoning was unanimous and that no person attended the public hearing of Council to speak against the proposed rezoning. The Appellant and one of her neighbours attended before the Board in opposition to the proposed rezoning. Others of her neighbours, apprised of the Board hearings via the mailed Notice of Hearing, appeared on their own initiative to support the proposed rezoning on the grounds that the Town needed the expansion, that traffic couldn't be much worsened by the proposed parking lot and access. On the evidence before it the Board is unable to determine whether the balance of neighbourhood views is pro or con the proposed rezoning.

The Board accepts as a fact that the Town is in need of economic expansion and notes that the Town's MPS favours economic expansion at p4:

> "A third goal is to increase the attractiveness of the Town's central business district so as to encourage stability of existing commercial services and inspire new development."

The Board notes as well that the first and general goal stated in the Town's MPS is:

> "...the promotion of orderly growth and development in such a way as to encourage a high quality living environment for all residents."

Having reviewed all of the evidence and the applicable law, the more pertinent portions of which are summarized above in this Decision, the Board finds that the uses permitted by the proposed rezoning would be potentially incompatible with the adjacent residential land uses and that this potential incompatibility cannot be controlled by the existing by-laws controlling the proposed C-1 Zone. Council therefore, in its decision to rezone, has made no adequate provision (and under its existing C-1 zoning by-law could not have made any provision) in the decision to meet the intent of the MPS for buffering, landscaping, and screening as is contemplated by Section H-6(e) of the Town's MPS. The Board must therefore find that the decision of Council appealed herein does not reasonably meet the intent of the Town's MPS (Planning Act s. 63(3)) and it determines that the decision of Council cannot reasonably be said to carry out the intent of the MPS (s. 63(5) of the Planning Act).

Pursuant to s. 63(4)(b) of the Planning Act, the Board allows the appeal and reverses the decision of Council made October 14, 1986, to amend the Town's Land-Use By-law by rezoning certain lands situated on Pond Street, Sydney Mines to be purchased by Food City Limited from one Anthony and also known as Site "A" from Residential (R-1) to Downtown Commercial (C-1).

Pursuant to Section 29 of the Municipal Board Act, an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 27th day of March, A.D., 1987.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

Ranni v. City of Sydney

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-1 TO R-3--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, SS. 63(1),(2)--CITY OF SYDNEY MPS, SECTIONS 7.1.4, 8.5, POLICIES 4, 8

This is an appeal by the applicant from a decision of the Council of the City of Sydney refusing to approve the Appellant's application to rezone 1.63 acres of vacant land from Residential (R-1) Zone to Residential (R-3) Zone to permit the construction of an apartment house. The subject property is at the boundary of the City with the County of Cape Breton, lies between Gay St. (fronts 241.87 ft.) and Alexandra St. (fronts 35.23 ft.) and is, to a considerable extent, low lying and marshy. The City's Municipal Planning Strategy (MPS) covers the subject area. The Director of Planning for the Cape Breton Metro Planning Commission testified that the proposed development was consistent with the City's MPS and that there is a demand for R-3 housing that is not satisfied.

HELD: The appeal is allowed and Council instructed to rezone the subject lands to R-3.

The Board is obliged to determine by virtue of s.63(3) "whether the decision of the council reasonably carries out the intent of the Municipal Planning Strategy" and is directed by s.63(5) not to allow the appeal unless the decision cannot reasonably be said to carry out the intent of the MPS. The Board must also concern itself with questions of "undue hardship" and "extraordinary and compelling circumstances" under the provisions of s.63(7). The Board is satisfied that: there is a need for additional multi-family housing developments; there is a shortage of vacant R-3 land; the City's MPS permits consideration of medium density multiple-family housing in areas designated residential or future development; the subject site is designated low to medium density; the MPS states the primary function of the area in which these lands are situate is residential of varying densities; the subject site because of its swampy nature is unlikely to be developed in the near future for single family dwellings; the neighbourhood would be enhanced if the swamp is removed; and the swamp can be eliminated at a cost of $60,000-$70,000. The Board agrees that the proposed rezoning to R-3 does meet the intent of the City's MPS. Both R-1 and R-3 development, it is conceded, meet the intent of the MPS. Though the proposed rezoning is within the intent of the MPS, the Board is restricted from allowing the appeal unless the Board is able to determine Council's refusal to rezone "cannot reasonably be said to carry out the intent of the MPS." In the opinion of the Board Council's decision cannot reasonably be said to carry out the intent of the MPS. Some members of Council made their decision to refuse the rezoning not on the intent of the MPS but as the result of submissions by area residents. Council may give consideration to these opinions, but must make its decision based on reasonably carrying out the intent of the MPS. If Council does not agree with the recommendation of planning staff, it should have some reasonable basis for so doing based on the intent of the MPS.

NSMB-551-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **DAVID RANNI** from the decision of the Council of the City of Sydney made October 2, 1986, refusing to approve the Appellant's application to amend the City's Land-Use By-law by rezoning a 1.63 acre parcel of land lying between Alexandra Street and Gay Street from Residential (R-1) Zone to Residential (R-3) Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: CHARLES R. LORWAY, LL.B., for the Appellant;

MICHAEL WHALLEY, Q.C., for the City of Sydney.

DECISION

This is an appeal by **DAVID RANNI** of Sydney, pursuant to Section 63(1)(b) of the Planning Act, from the decision of the Council of the City of Sydney made October 2, 1986, refusing to approve the Appellant's application to amend the City's Land-Use By-law by rezoning a 1.63 acre vacant parcel of land lying between Alexandra Street and Gay Street in the City of Sydney, from Residential (R-1) Zone to Residential (R-3) Zone to permit the construction of an apartment house.

The Appellant's Notice of Appeal filed as Exhibit R-1 is dated October 8, 1986, and was received by the Board on the same date. The Board directed the Appellant to file an Amended Notice of Appeal. The Appellant filed on October 21, 1986, as Exhibit R-2, an Amended Notice of Appeal dated October 21, 1986.

The hearing of the Appeal took place in the City Council Chambers of the City of Sydney on February 19, 1987.

Counsel for the Appellant tendered the Affidavit of the Appellant sworn to on February 18, 1987, in proof of the service of the Notice of Hearing in accord with the Board's instructions. This Affidavit was filed as Exhibit R-3.

The Clerk of the Board arranged for the advertisement of the Notice of Hearing in the Cape Breton Post by three insertions which appeared on January 29, 1987, February 5, 1987 and February 12, 1987.

Counsel for the City of Sydney advised the Board that he had no objections to the Board's jurisdiction to hear the appeal on the merits. The Board, being satisfied that the Notice of Appeal was filed with the Board within the statutory 21 days provided for under Section 63(2) of the Planning Act and that all preliminary procedures and advertising had been properly carried out, assumed jurisdiction to hear the appeal on the merits.

The Appellant's Notice of Appeal did not set out the grounds of the appeal. The Amended Notice of Appeal set forth the following grounds of appeal:

"In my opinion, I believe that council's decision was in error for the following reasons;

1. That some residents are in favor of such development. (Item #2 attached).

2. That, in the opinion of a professional Real Estate Appraiser and Land Consultant, it is not practical for this area to be developed as presently zoned due to configuation and condition of site.

3. That, in the opinion of the same appraiser, such a proposal 'could only improve this site and enhance the neighbourhood.'

4. That this application meets all of the requirements of the Municipal Planning Policies as indicated by two reports from The Metro Planning Commission dated August 13, 1986 and September 16, 1986.

5. That this area is designated for Residential use of varying densities as per report from the Metro Planning Commission and carries out the intent of the Municipal Planning Strategy."

Evidence on behalf of the Appellant was given by Donald Snow, Peggy Buchanan, Thomas Pratt, Charles Hopkins, Walter Sawlor, James McArthur, Paul Graham, David Ranni the Appellant, and Douglas Foster. Wayne Lidster testified on his own behalf. Alderman Charles Palmer was the only witness called by the City.

The subject property located in the southern end of the City consists of a vacant 1.63 acre parcel of land, irregular in shape, extending from Gay Street on the southeast to Alexandra Street on the northwest. It is bounded on the southwest by property of Donald Buchanan and the City of Sydney boundary line with the Municipality of the County of Cape Breton. On the northeast side it is bounded by three properties fronting on the southwest side of Windsor Street owned by Neil Petrie, William Smith and the City and by the property of Wayne Lidster fronting on Alexandra Street. The subject property has a 241.87 foot frontage on Gay Street but is only 35.23 feet wide along Alexandra Street. A considerable portion of the subject site is low lying and marshy. It is shown on a plan of survey prepared by Eric R. Whyte, N.S.L.S. whose certificate dated July 22, 1986, appears on the plan, a copy of which was filed as a part of Exhibit R-17.

Alexandra Street is an arterial street in the City of Sydney which runs from Kings Road on the north to the City's boundary on the south. It continues beyond the City's boundary on the south and becomes Provincial Highway No. 327 leading to Marion Bridge and beyond.

The first witness to testify was Donald Snow who resides at 25 Virginia Street which is situate in the Municipality of the County of Cape Breton several hundred feet from the subject site. Mr. Snow has lived on Virginia Street for 30 years and is familiar with the subject site which he described as wet swampy land. He expressed the opinion that the development of the subject site would be very good for the neighbourhood as it would eliminate the swamp. He stated there are several multi-family developments in the neighbourhood. On cross-examination Mr. Snow stated that he had not attended the public hearing held by the Council.

Margaret Buchanan the owner of property known as No. 701 Alexandra Street which is immediately adjacent to the subject site was the next witness called by the Appellant. She has lived at this location for the past 35 years. She along with other members of her family had sold the subject property to the Appellant. She stated a deed had been given to the Appellant less than a week before the hearing. She said she was aware of the Appellant's intentions to build apartment units on the subject site. She agreed with Mr. Snow the first witness that a large portion of the subject site is a swamp. She expressed the opinion that the proposed development of the subject site for multi-family residential purposes would be a positive force and improve the area. She fully supports the Appellant. She indicated that her residence and the subject site were at one time owned by her late father.

On cross-examination Ms. Buchanan stated she had attended the public hearing conducted by the Council but had not spoken at the hearing. She stated that no one likes the swamp located on the subject site and since the Appellant was prepared to clean up this swamp as part of his development, the neighbourhood would be enhanced.

Thomas Pratt, a resident of 55 Windsor Street, located about 500 - 600 feet from the subject site, is also familiar with the subject site and expressed his opinion that the proposed development is a good one and would improve the neighbourhood by eliminating the swamp. He has lived in the neighbourhood for 40 years. On cross-examination he stated he had attended the public hearing conducted by Council and had spoken in favour of the rezoning application.

Charles Hopkins, the Regional Director of Assessment for the Cape Breton Assessment Region was called by Counsel for the Appellant and appeared under subpoena. He expressed his opinion that well built and well maintained apartment buildings in the City of Sydney had not in the past resulted in any devaluation of single family properties adjacent to these apartment buildings. Generally speaking he considered that apartment buildngs do not detract from single family dwellings in the same neighbourhood. In response to a question from the Board, Mr. Hopkins could not say whether the value of single family dwellings adjacent to apartment buildings would increase in value at the same rate if no apartments were constructed.

Walter A. Sawlor, an accredited real estate appraiser testified on behalf of the Appellant. He stated that there is an adequate supply of R-1 zoned lands in the City of Sydney but there is very little R-3 zoned lands in the City. He stated that at the request of the Appellant he had inspected the subject site and had prepared a letter (Exhibit R-9) dated August 1, 1986, addressed to the Appellant which states that:

> "In my opinion the subject site as it exists is very wet and would be considered a substandard or inferior grade location. Construction of new multi-family units could only improve this site and enhance the neighbourhood.
>
> The neighbourhood consists of an older residential area and in my opinion a proposed new multi-family development would not reduce or lower the value of surrounding properties."

Mr. Sawlor expressed the opinion that the development of the subject site for multi-family purposes by the Appellant would not devalue surrounding properties if the development was consistent with other developments constructed by the Appellant. Mr. Sawlor stated that the average assessment value of houses in the subject neighbourhood was approximately $28,000.00.

In Mr. Sawlor's opinion the development of the subject site for R-3 purposes would not have a greater impact on values of properties than if the site were developed for R-1 purposes. He considered that the effect on the value of adjacent properties would be the same whether the subject site was developed for R-1 or R-3 purposes.

James McArthur, a field representative for the Department of Housing for the past 15 years was called by the Appellant and testified that he has been involved in land sales in the City. His department has R-1 and R-2 zoned lands for sale but little R-3 zoned land. He stated that there is sufficient R-1 zoned land available for sale and three R-2 zoned lots but his Department does not have any R-3 serviced land for sale.

Paul Graham a professional engineer with 14 years' experience testified that he is a soil engineer specialist and is the resident manager in Sydney of the Jacques Whitford & Associates Ltd. Office. He had inspected the subject property, the eastern portion of which he described as swampy. He stated that to develop the subject site the swamp material must be removed and replaced by other fill. Some swamp material had already been removed from the site and replaced. He stated that it would not be reasonable to make plans for the development of the site until the site is improved. He said that the swamp clean-up would cost up to $60,000.00 to $70,000.00. He described the western (or Alexandra Street) end of the subject property as good for development. He had not been asked by the Appellant to formulate a drainage plan for the subject site. He stated that the subject site would be costly to develop but the elimination of the swamp would not be difficult. He expressed the opinion that proper drainage of the site would enhance the William Smith property and the City's property on Windsor Street which abut the subject site. He considered that a multi-family development of the subject site was the economically feasible method of developing the site. He also stated that the site can be developed without injury to the surrounding properties.

David Ranni, the Appellant, testified that there are municipal water and sewer services in close proximity to the subject site on both Alexandra and Windsor Streets. He stated that at this time he had no specific development plans for the subject site although he proposed to develop it for R-3 purposes. He stated he would continue with his efforts to improve the site and when this work has been completed he would determine what development would take place. He stated that he is totally convinced of the feasibility of developing the subject site for multi-family dwelling units.

Expert planning evidence was given by Douglas Foster, the Director of Planning for the Cape Breton Metro Planning Commission. He stated that the City's Municipal Planning Strategy (M.P.S.) filed as Exhibit R-4 is currently under review. He also stated that Exhibit R-4 does not contain any amendments to the M.P.S. He said there was a recent amendment to the M.P.S. respecting "Hazard Land". A copy of this Amendment approved by the Minister of Municipal Affairs on November 21, 1986, was filed as Exhibit R-15.

Mr. Foster stated that there was little or no undeveloped R-3 zoned lands in the City of Sydney. He said that the subject lands are located within area 5 as shown on Map 4 attached to the City's M.P.S. He was asked if the proposed development was consistent with the City's Municipal Development Plan now known as the Municipal Planning Strategy (M.P.S.). He said it was but he originally had one reservation which was later resolved to his satisfaction. He said there is a demand for R-3 housing which is not satisfied.

The permitted uses in the Residential Multiple (R-3) Zone are:

> "No Development Permit shall be issued in a Residential Multiple (R3) Zone except for one or more of the following uses:
>
> All uses permitted in the R2 Zone, subject to the R2 Zone requirements
> Apartment dwellings up to 40 units per net acre
> Nursing homes, Homes for the aged

> Any use permitted in the C4 Commercial Local Zone up to a maximum of 1,000 square feet of commercial floor area and which is wholly contained within the multiple unit apartment
> Senior Citizen Housing"

Mr. Foster prepared Exhibit R-11 which is a planning report dated August 16, 1986, and which he submitted to the City Council respecting the Appellant's application for rezoning. The report at page 1 states that:

> "The general policy in Section 7.1.4, Policy 4, provides for the consideration of zoning amendments to permit medium density multi-family housing in any residential area and the objectives for Area 5 in Section 8.5 mentions that the primary function of this area should be residential of varying densities.
>
> Such an amendment to Residential (R3) is therefore within the general intent of the plan provided the other relevant criteria in the Municipal Planning Strategy are weighed."

The Report after addressing various relevant portions of the M.P.S. states that:

> "The site contains some obvious marshy conditions, however the drainage plan provided by a professional engineer as well as the engineered foundation should overcome what are moderate site problems".

The Report also comments that:

> "Although there is usually planning concerns when rezoning to medium density in an area previously zoned for single-family (R1) with six (6) single-family abuttors, the Planning Strategy shows intent to allow medium density and the objectives for Area 5 include residential uses of varying densities.
>
> Although there is a normal planning principal that existing single-family uses in a single-family zone should be protected, no such policy is stated in the Planning Strategy except by way of indirect impacts such as traffic."

Finally the Report makes the following recommendations:

"Recommendations: The staff of the Metro Planning

> Commission is of the opinion that the proposal to amend the Land Use By-law for the land shown on Appendix E from (R1) to (R3) generally carries out the intent of the City's Municipal Planning Strategy but there is some concern over the adequacy of water pressure for fire flows, should the site be developed to its maximum density under Residential (R3) Zoning.
>
> Both an engineered drainage plan of the site and engineered foundation plans for the building would be required at the building permit stage.
>
> Under the circumstances, we would recommend that Mr. Ranni's application be approved for advertising but that a final recommendation is dependant on recommendations from the Fire Chief and Director of Water Resources regarding adequacy of flows given maximum density development."

Mr. Foster referred to a study carried out by the Staff of Cape Breton Metro Planning Commission entitled "City of Sydney, Background Report for the Municipal Planning Strategy and Land Use By-law", dated October, 1986, a copy of which is filed as Exhibit R-13. Section 5.2 of this report relates to multi-family housing and concludes with the following comments:

> "There are two trends indicated in the area of multi-family housing. The current federal government has halted capital cost assistance programs which allowed non-profit agencies to provided a total of 80 new multi-family units and 67 single family units during the past five years. The informal survey of non-profit housing agencies indicated that at the present time there are approximately 450 individuals and families seeking adequate, affordable housing through these agencies. This does not include waiting lists which exist for housing in units owned privately or people searching on their own. Officials from these agencies have indicated that the demand for adequate affordable housing is presently critical and with the cancellation of some federal housing programs they do not expect to be in a position to meet this demand in the coming year.

> The other significant trend indicated is that private developers have been responsible for more than half of the multi-family housing constructed since 1981 and they wish to continue developments of this nature as evidenced by the number of applications to rezone lands for medium density residential construction. If the demand for multi-family housing is to be met, appropriately serviced and suitably zoned lands must be available."

Section 5.3 relates to Senior Citizen Housing. It contains the following comment, viz:

> "The demand for senior citizen housing will increase as the general population ages and as with multi-family housing appropriately serviced and suitably zoned lands must be available."

Mr. Foster stated that to meet the demand for multi-family housing in the City some areas of the City would have to be rezoned.

Mr. Foster on direct examination stated that in his opinion the proposed rezoning carries out the intent of the M.P.S.

On cross-examination, Mr. Foster agreed that there are some vacant R-4 zoned areas in the City and that R-3 Zone uses are permitted uses in R-4 Zone areas.

Also on the cross-examination of Mr. Foster, Counsel for the City endeavoured to have admitted in evidence a report dated June 16, 1986 prepared by Mr. Foster and submitted to the City with respect to a previous application by the Appellant to have the subject property rezoned to R-3. Counsel for the Appellant objected to the admissibility of this report on the basis that it was not relevant. The Board admitted the report as Exhibit R-16 on the basis that it was relevant.

The Planning Report of June 16, 1986, states in part as follows:

> "The major planning question with this proposal is compatibility with the neighbouring Residential (R-1) single family uses, although there is no policy in the Planning Strategy which specifically raises this concern.
>
> There is, however, a planning principle that the impact on existing uses should be weighed heavily when a change in the Land Use By-law is contemplated. The neighbouring uses are currently single family and the existing zoning is Residential One (R1).
>
> Recommendations: Under these circumstances, the impact in terms of change in privacy, traffic, and the nature of the neighbourhood is best judged by the neighbourhood.
>
> The acceptability of a change to allow multiple family units in an area zoned for and now in single family residential use should in some way be measured by the acceptability of the proposal to the existing single family uses.
>
> This is an unknown factor at the date of this writing and under the circumstances we could not make a recommendation in favour of the proposal.
>
> If, after the public hearing is held on the proposed zoning change, none of the neighbouring uses object, the staff could accept the site as adequate. Staff would not recommend the change over the objections of single family neighbours, whose concerns should be paramount.
>
> If Council does approve the amendment, an engineering evaluation of the site for drainage and building bearing capacity will be needed."

Mr. Foster was asked by Counsel for the City to state what weight should be given to opinions expressed through the public participation process. His answer was that this was not a matter for him to determine but was a matter for the Council. Mr. Foster was asked if the rezoning of the subject property to R-3 would change the character of the neighbourhood and he said it would change for the better.

Mr. Foster explained that his opinion had changed between the time of his June report and his later report in August. In his June report he was concerned on broad planning principles about the impact of the proposed rezoning on the neighbouring single family uses. In August, based on his interpretation of decisions by the Board, he had concluded that the proper test in rezoning applications was to assess the application in terms of the intent of the M.P.S. and in his opinion the M.P.S. does not specifically set out the question of possible impact of the proposed multi-family (R-3) zoning on the neighbouring single family dwellings. Therefore his August report concluded that the proposal "generally carries out the intent of the City's Municipal Planning Strategy."

On being questioned by the Board, Mr. Foster expressed the opinion that both R-1 and R-3 uses were consistent with the intent of the M.P.S. He said that the Generalized Future Land-use Map for Area 5 envisages mixed low and medium density residential uses. On being asked whether the Council's decision in refusing to approve the rezoning request was within or without the intent of the M.P.S. Mr. Foster said he didn't know.

Mr. Foster was asked if he would have recommended the rezoning to R-3 if there was no M.P.S. in effect in the City. He said he would have recommended the rezoning.

Evidence was given by Wayne Lidster, an oil burner mechanic who has resided at 699 Alexandra Street in Ward 2 for 22 years. His evidence was read into the record from a prepared text filed as Exhibit R-17. He is opposed to the rezoning. He expressed the opinion that "we already have reached a saturation point in multi-unit apartment developments. We feel this will greatly decrease the value of our properties." He indicated that the proposed development would be much larger than the area residents had anticipated. He stated in his written submission that "as residents of the affected area we are greatly concerned about the environmental and social impact that will be created if this type of rezoning is permitted to take place in our area". Attached to Mr. Lidster's written submission is a photocopy of a petition dated September 14, 1986, signed by residents of Alexandra Street, Windsor Street and Gay Street opposing the proposed rezoning.

Evidence on behalf of the City was given by Alderman Charles Palmer who represents Ward 2 in which the subject site is located. He stated there were 170 apartment buildings in Ward 2 and he was strongly opposed to the proposed rezoning to permit another apartment building. It is clear from the evidence of Mr. Palmer that he and the other councillors were persuaded by the submissions of members of the public who opposed the rezoning proposal although they did weigh the application in relation to the provisions of the M.P.S.

This appeal having been brought pursuant to Section

63(1)(b) of the Planning Act, S.N.S. 1983, c. 9, the Board is obliged to make a determination by virtue of s.s. (3) of Section 63 "whether the decision of the council reasonably carries out the intent of the Municipal Planning Strategy." The Board is directed by the provisions of s.s. (5) of Section 63 "not to allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy." The Board must also concern itself with the provisions of s.s. (7) of Section 63 which states that:

> "Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> a) the applicant would suffer undue hardship; or
>
> b) extraordinary and compelling circumstances are present."

Post Hearing Memoranda were filed with the Board on March 19, 1987 by Counsel for the Appellant and Counsel for the City. Counsel for the Appellant in his memorandum at page 5 states the Appellant's position as follows:

> "With respect the Appellant submits that the Council's rejection of this proposal amounted to a rejection of all the forceful and uncontested rationale developed by those who supported the Appellant's Application, ignored the intent of The Municipal Planning Strategy, including ignoring the mechanism installed in the strategy which was clearly put in place to encourage such re-zonings to take place, and ignored the fact that although the existing zoning and the proposed zoning both comply strictly speaking with the intent of the strategy, that the proposed zoning is preferable and the overall intent of the plan can more reasonably be met by adopting the re-zoning."

Counsel for the Appellant in paragraph 9 of his

Post Hearing Memorandum "suggests that the thrust of the Planning Strategy for the City of Sydney dictates that in these particular circumstances, Council could not reject the Appellant's Application without running counter to the intent of the Municipal Planning Strategy. Furthermore, the hydrologist's (Jacques, Whitford & Associates Limited) Report indicates that with the large amount of swamp land on the site, costs to develop single residential housing would be so prohibitive that in effect the property would not be developed at all if left zoned as R1. These compelling circumstances require, if one is to honor the Planning strategy's intention that Sydney would 'encourage sufficient and good quality housing in a broad range of housing costs' that such [Plans] (sic) lands be re-zoned multiple residential (R3)."

The last paragraph of the Appellant's Post Hearing Memorandum reads as follows:

> "The Appellant suggests that it would be in order for the Nova Scotia Municipal Board to over-turn the decision of the City as being clearly contrary to the Planning Strategy and to the best interests of the Municipality, and grant the Appellant's Application for re-zoning from R1 to R3."

Counsel for the City in his Post Hearing submission states that:

> "Alderman Palmer gave evidence as to how he (and City Council) approached the matter. His evidence, I submit, clearly indicated that the City Council duly considered all the criteria as set forth in the Municipal Planning Strategy for a zoning amendment and further indicated that in the final analysis he and other members of council were persuaded by the public submissions which were overwhelmingly in favour of rejection

> of the application. Thus, it is submitted, where an existing zone and a proposed zoning both comply with the intent of the Municipal Planning Strategy, the expressed preference of the public, as evidenced from submissions presented to Council at a public hearing, should be the deciding factor. To come to any other conclusion would it is submitted, not be consistent with the whole intent of the Planning Act in inviting and encouraging public participation in the Planning procedure. -This is not to suggest that the planning process should become a popularity contest; but all other relevant matters considered, the expressed intention of the majority of the public submissions should be given the appropriate weight by the council in coming to a decision in planning matters.
>
> It is therefore submitted that the Board should not determine that 'the decision of the council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy'.
>
> Finally, in regard to s.s.(7) of Section 63, it is submitted that the appellant has not suffered undue hardship nor were there any extraordinary and compelling circumstances present to enable the Board to exercise its discretion to invoke the provisions of this subsection of the Act. I refer to the decision of the Board in the Dr. S.K. Ummat appeal - NSMB-456-84-P at page 30 quoting from the appeal by Ruth G. Black that 'the burden of proving "hardship" to a balance of probabilities is on the appellant'. It is submitted that as in that case, here the Appellant has not discharged this onus."

From the evidence adduced at the hearing the Board is satisfied that:

(1) there is a need for additional multi-family housing developments in the City of Sydney;

(2) there is a shortage of vacant Residential Multiple R-3 zoned lands in the City which permit the construction of apartment buildings up to a density of 40 units per net acre;

(3) The City's M.P.S. makes provision in Section

7.1.4 Policy 4 for the Council of the City "...to consider zoning amendments to permit medium density multiple-family housing in any of the areas designated as residential or future development on the Municipal Development Plan Map No. 4 to a maximum density of 40 units per net acre subject to the considerations outlined in Policy 8 below.";

(4) the subject site lies within the boundaries of the City's Planning Area 5 and is designated "Low to Medium Density" on Map No. 4;

(5) the M.P.S. in Section 8.5 relating to Area 5 states inter alia that "The primary function of this area shall be residential of varying densities, including specialized residential facilities for senior citizens.";

(6) a large portion of the subject site is swampy and is unlikely to be developed in the near future for single family dwelling purposes;

(7) the neighbourhood in the vicinity of the subject site will be enhanced if the swamp on the subject site is removed;

(8) the swamp can be eliminated at a cost to the developer of between $60,000.00 to $70,000.00.

It is conceded by counsel for the Appellant and for the City that both R-1 development and R-3 development for the subject site meet the intent of the City's M.P.S. Counsel for the Appellant submits that R-3 development is to be preferred and therefore the proposal to rezone to R-3 should be approved. Counsel for the City submits that in a situation such as the case at hand where both R-1 and R-3 developments meet the intent of the plan, the matter should be resolved in favour of the existing R-1 development because of the fact that "the expressed preference of the public, as evidenced from submissions presented to Council at a public hearing, should be the deciding factor."

The Board notes that the Staff of the Metro Planning Commission has recommended approval of the Appellant's application to have the subject property rezoned to R-3. The extensive staff report dated August 13, 1987, given to the City reviews the relevant policies set forth in the City's M.P.S. and concludes that the "proposal to amend the Land-Use By-law ... from (R-1) to (R-3) generally carries out the intent of the City's Municipal Planning Strategy but there is some concern over the adequacy of water pressure for fire flows, should the site be developed to its maximum density under Residential (R-3) Zoning".

The concern expressed in the Staff Report of August 13, 1986, was satisfactorily resolved in September of 1986 when Mr. Foster the Executive Director of Cape Breton Metro Planning Commission reported to the City that a letter from Alex MacDonald dated September 15, 1986, sent to the Appellant "satisfies the one remaining concern re adequate fire flows". Mr. Foster's Report of September

16, 1987, states that "If the additional hydrant is supplied off the 8" supply line, we are satisfied that the amendment to R-3 carries out the intent of the Plan and therefore recommend the amendment".

Alex MacDonald is A.J. MacDonald, P.Eng. the Director of Water Resources for the Sydney Water Commission. His letter dated September 15, 1986, is contained in Exhibit R-11 and reads as follows:

> "Re Water Service, Proposed Subdivision - Alexandra - Windsor Streets Area, Sydney, Nova Scotia."

With reference to your recent request, we would advise that water service is available in sufficient quantity to service 65 units with approximately 195 consumers.

In order for this facility to meet fire flow conditions, it would be necessary to install a hydrant off the 8" supply line, and the location to be approved by the Water Commission.

The Board having perused the City's M.P.S. and having visited the subject site and surrounding neighbourhood agrees with Mr. Foster and the Staff Report that the proposed rezoning to R-3 does in fact meet the intent of the City's M.P.S. This finding does not in itself determine the question of whether the Board should allow the appeal. Under the provisions of s.s. (5) of Section 63 of the Planning Act the Board "shall not allow the appeal unless the Board determines that the decision of council cannot reasonably be said to carry out the intent of the Municipal Planning

Strategy." (Emphasis Added).

The Board is obliged to make a determination pursuant to s.s. (3) of Section 63 "whether the decision of the council reasonably carries out the intent of the Municipal Planning Strategy."

Even in those cases where the proposed rezoning already is within the intent of the M.P.S. the Board is restricted from allowing the appeal unless the Board is able to determine that the Council's decision in refusing to approve the application to rezone "cannot reasonably be said to carry out the intent of the Municipal Planning Strategy."

In the case of the appeal by Dr. Ummat against the decision of the Council of the City of Dartmouth (NSMB-456-84-P) the Board in its decision dated December 16, 1986, refused to allow the appeal where all parties were in agreement that the proposed rezoning as well as the existing zoning met the intent of the City's M.P.S. because the Board determined that the Council's decision in refusing to approve the rezoning was reasonably within the intent of the M.P.S. In the recent appeal by Home East Development Ltd. (NSMB-539-86-P) The Board in its decision dated February 18, 1987, allowed the appeal in a situation where the existing zoning and the proposed rezoning both met the intent of the M.P.S. because the Board determined in that case that the Council's decision did not reasonably meet the intent of the Municipality's M.P.S. An application by the Municipality for leave to appeal in the Home East case was refused by the Appeal Division of the Supreme Court of Nova Scotia (S.C.A. No. 01772).

In the opinion of the Board the Council's decision in the case at hand cannot reasonably be said to carry out the intent of the City's M.P.S. Expert planning evidence was given by Douglas Foster, a qualified and knowledgeable land use planner that the proposed rezoning meets the intent of the M.P.S. and this evidence was not rebutted.

It is to be noted that the Minutes of the meeting of the City Council held on October 2, 1986 when the vote on the rezoning application was taken, indicate that the views of the area residents was taken into consideration by some of the Aldermen. These Minutes filed as Exhibit R-7 read in part as follows:

> "On discussion of the resolution, Alderman Kennedy noted he would vote against the resolution and in favour of the amendment if he had a vote. He noted development and assessment and housing are desperately needed in the City. Other Aldermen felt the views of the residents in the surrounding area should be taken into consideration and the residents were not in favour of this amendment".

The Minutes further indicate that 6 aldermen voted in favour of the resolution to refuse approval of the proposed amendment and 4 aldermen voted against the resolution with 2 aldermen abstaining because they had not been present for the public hearing on the application.

From the evidence of Councillor Palmer it would appear that he and the other members of the Council made their decision to refuse the Appellant's application for rezoning not on the intent of the M.P.S. but as the result of submissions made to the Council by area residents.

While it is relevant and proper for the Council to give consideration to the opinions expressed by residents, the Council must make its decision based on reasonably carrying out the intent of the M.P.S. While the Council is not under any obligation to accept the recommendation of its own staff or that of the Cape Breton Metro Planning Commission in any particular application for an amendment to the City's Land-Use By-law, it nevertheless is obliged to consider the application in relation to the intent of the M.P.S. and if the Council does not agree with the recommendation of the Metro Planning Commission staff it should have some reasonable basis for so doing based on the intent of the M.P.S. and not on the opinions of some of the residents of a particular area of the City where the proposed development is to take place.

The Board therefore having determined that the Council's decision does not reasonably carry out the intent of the M.P.S. and that the proposed rezoning of the subject lands to R-3 is within the intent of the M.P.S., allows the appeal pursuant to s.s. 4(c) of Section 63 of the Planning Act and instructs the council of the City of Sydney to amend its Land-Use By-law by rezoning the subject 1.63 acre parcel of land from Residential (R-1) Zone to Residential (R-3) Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of April, A.D., 1987.

RHBlois

R.H. BLOIS
Chairman

NOVA SCOTIA MUNICIPAL BOARD

Murphy v. Town of Antigonish

PLANNING--ZONING AMENDMENT--APPROVAL OF REZONING FROM R-1 TO R-3--WHETHER AGGRIEVED PERSON--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--MUNICIPAL BOARD ACT, S. 25(1)--PLANNING ACT, SS. 38, 63(1), (2)--TOWN OF ANTIGONISH MPS, SECTION 7.2, POLICIES P-6, P-120, P-121, P-122

This is an appeal by M.F.M. as an aggrieved person from a decision of the Council of the Town of Antigonish rezoning lands on Church St. from Residential First Density (R-1) Zone to Residential Multiple Density (R-3) Zone to permit the construction of an apartment house. The Appellant owns a large two-storey single family dwelling in which she has resided for 51 years directly opposite the subject property. Both the Town's Development Officer and the Chairman of the Planning Advisory Committee (PAC) recommended approval, but neither would have had they been aware that the applicant did not meet necessary street frontage for an apartment house. The subject property lies within the Town's Municipal Planning Strategy (MPS).

HELD: The Board allows the appeal and reverses the decision of Council.

Although the Appellant's status as an "aggrieved person" was not questioned, it is the Board's duty to determine this in order to assume jurisdiction. The Board's opinion is that the Appellant qualifies as an "aggrieved person". Her pecuniary interest is directly affected. The increased traffic and higher density use that will result will have some adverse effect on her property.

The issue is whether the decision of Council reasonably carries out the intent of the Town's MPS (s.63(3) of the Planning Act). The Board is restricted from allowing the appeal unless the decision cannot reasonably be said to carry out the intent of the MPS (s.63(5)). The amendment in question does not meet the criteria set out in Policy P-121 and does not meet the intent of Policy P-120 in that the minimum lot frontage standard set out in the Residential Multiple Density (R-3) Zone with respect to apartment buildings is not met. However, the approximate frontage of 82 ft. of the subject property is in compliance with the R-3 requirements for triplex buildings, Senior Citizen Housing and Nursing Homes, Boarding Houses, Guest Houses and Converted Dwellings. It is apparent that Council approved the rezoning on the understanding the developer intended to construct a 6-unit apartment building. Because the R-3 Zone requirements for an apartment building have not been met, the Board must conclude Council's decision does not meet the intent of the MPS. If the subject property had the necessary 30.5 metres frontage for apartment houses, the Board notes that a 6-unit apartment house would reasonably be within the intent of the MPS. A larger apartment house building, though, because of its density would not be consistent with the general area and so would conflict with the criteria in Policy P-6. Under the Town's R-3 Zone, however, development could not be restricted to 6 units. If a contract development procedure were available, development could be restricted to ensure a 6-unit building.

NSMB-566-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **MARY FRANCES MURPHY** from the decision of the Council of the Town of Antigonish, made the 15th day of December, 1986, which decision amended the Land-Use By-law of the Town of Antigonish by rezoning lands on Church Street from Residential First Density (R-1) Zone to Residential Multiple Density (R-3) Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: WILLIAM F. MURPHY, Q.C. for the Appellant,

ALEXANDER G. MacDONALD, LL.B., and DUNCAN JOHN CHISHOLM, LL.B., for the Town of Antigonish,

ALLAN ARMSWORTHY, the Developer appeared on his own behalf.

DECISION

This is an appeal by **MARY FRANCES MURPHY**, pursuant to Section 63(1)(a) of the Planning Act, S.N.S., 1983, Chapter 9, from the decision of the Council of the Town of Antigonish, made December 15, 1986, approving an amendment to the Town's Land-Use By-law by rezoning lands on the east side of Church Street from Residential First Density (R-1) Zone to Residential Density (R-3) Zone to permit the construction of an apartment house.

The Appellant's Notice of Appeal, filed as Exhibit M-1, is dated January 8, 1987, and was received by the Board on January 19, 1987. The Town first advertised the decision in The Casket newspaper circulating in the Town on December 31, 1986.

The grounds of appeal set forth in the Notice of Appeal are that "the decision of the Town Council contravenes the Zoning By-law of the Town of Antigonish and is inconsistent with or unnecessary for the protection of the best interests of the Town and is not in the best interests of the Town."

The Appellant's solicitor filed an Affidavit of Service of the Notice of Hearing in compliance with the Board's instructions (Exhibit M-2).

The Clerk of the Board arranged for the Notice of Hearing to be advertised in The Casket newspaper. Copies of tear sheets from that newspaper filed as Exhibits M-3 and M-4 indicate that the Notice of Hearing appeared in The Casket on March 4th and March 11, 1987.

The Board, being satisfied that the Appellant's Notice of Appeal was filed with the Board within the 21-day appeal period provided for in Section 63(2) of the Planning Act, that the Appellant had complied with the Board's instructions as to the service of the Notice of Hearing and that the Notice of Hearing had been advertised to the Board's satisfaction and in accordance with the provisions of Section 25(1) of the Municipal Board Act, S.N.S., 1981, C. 9, proceeded on March 23, 1987, to hear the appeal on the merits in the Town Council Chambers.

Counsel for the Appellant, at the commencement of the proceedings, informed the Board that he wished to amend the Appellant's Notice of Appeal by deleting the grounds set out in the Notice and substituting the ground that the Council's decision did-not meet the intent of the Town's Municipal Planning Strategy. The Board does not have any power to allow the Appellant to amend the Notice of Appeal at this stage of the proceedings but the Appellant was permitted to proceed on the basis that the Appellant's case was based on the Council's decision being contrary to the intent of the Town's Municipal Planning Strategy (M.P.S.).

The Appellant is the owner of a large two-storey single family dwelling in which she has resided for the past fifty-one years which is situate at No. 86 Church Street in the Town directly opposite the subject property. The subject property is owned by Alan Armsworthy, a school teacher by profession, who resides in a large single family dwelling immediately adjacent to the subject site.

The Appellant testified that Mr. Armsworthy tore down the single family dwelling located on the subject property at the time of purchase and the site was now vacant. She described the neighbourhood in which she lives and where the subject site is situate as being residential in nature and in which are located many large older homes originally constructed as single family dwellings. In close proximity to her home and the subject site is a funeral home, St. Paul's Church and a day-care centre. Both the funeral home and the day-care centre were formerly single family residences. The Antigonish Mall is accessed from Church Street a short distance from the subject site. She described the traffic on Church Street as "terrible" in comparison to the traffic prior to the construction of the Mall. She said that she frequently has difficulty in getting in and out of her driveway to Church Street because of the traffic on that Street. She said that parking on the west side of Church Street where she lives is prohibited.

Mrs. Murphy said she had viewed Mr. Armsworthy's plans for his proposed apartment building for the subject site. She said the proposed building was as large or larger than Mr. Armsworthy's own home located next to the subject site. She indicated that the subject site had been below the level of the street but that Mr. Armsworthy had brought it up to street level by means of fill.

On cross-examination by Mr. Armsworthy, Mrs. Murphy agreed that some changes to the character of Church Street had taken place over the years in that some of the large single family homes had been converted to apartment uses. Mrs. Murphy expressed her concern that there would be an increase in traffic on Church Street and there would be more noise pollution if an apartment building were constructed on the subject site. Mrs. Murphy indicated that despite the changing uses of properties in her neighbourhood the appearances are the same in that most of the houses built as single family dwellings still have the same exterior appearance even though some of them are now used for multi-residential purposes. She expressed her preference that a single family home should be constructed on the subject site.

Alan Armsworthy, the owner of the subject site was the next witness to testify. He resides in a large single family dwelling at 91 Church Street which is next to the subject site at 85 Church Street. The subject site actually consists of a vacant lot of land known as 85 Church Street plus a 14' portion of the property at 91 Church Street. The vacant lot situate at 85 Church Street is approximately 68' wide and is between 250' and 275' deep. The rezoned area has a frontage on Church Street of 82' (68' + 14'). Mr. Armsworthy proposes to construct a 6-unit apartment building on the rezoned land. He indicated that the maximum allowable number of apartment units for this site under the R-3 Zone is 12 but he only intends to build a 6-unit building. Parking spaces would be provided in the rear of the building.

Mr. Armsworthy stated he did not wish to upset the residents of Church Street by his proposed building so he went around the neighbourhood to discuss his proposal and said that he had little objection from his neighbours. He said that he had discussed his proposal with Mrs. Murphy, the Appellant, who informed him that she might be interested in taking an apartment unit herself although she was the one person in the neighbourhood who objected to his proposed building.

Mr. Armsworthy filed a sketch of his proposed building (Exhibit M-16). He said the building would be 55' - 58' wide and 45' deep and would be 16 feet plus roof height above grade in front. The building would have three storeys, two above ground level and one basement below ground level and he said it would fit in well with the existing buildings in the neighbourhood. He pointed out that the Appellant's house is 50' - 60' wide.

Mr. Armsworthy tendered a series of photos of properties in the neighbourhood. These photos included a view of the Dr. MacKinnon property at 95 Church Street in which there are two apartments (M-23), a view of the Henry property at 97 and 99 Church Street in which there are two apartments (M-24), the A.K. MacDonald property at 103 Church Street in which there are six apartments (M-25), the Dr. Fiaz property at 102 Church Street in which there are two apartments (M-26), the day-care centre at 81 Church Street (formerly the residence of Senator Graham) (M-28), the Albert Whidden property on Church Street in which there are six apartments (M-29).

Eileen Henry a longtime resident and owner of property at 99 Church Street testified that Church Street is an access street to the Trans Canada highway and to the Antigonish Mall and that is a "fact of life". On cross-examination by Mr. Armsworthy she described his proposed apartment house building as "marvelous". She considered that Mr. Armsworthy would be doing a service to aging persons by constructing his proposed building. She stated that she had no objection to the project.

John Allen MacCormick a resident of 90 Church Street testified that the traffic on Church Street had increased substantially over the years and an apartment building would put pressure on the Town's water and sewer system. He considered the present traffic on Church Street to be at a dangerous level but did not believe the additional traffic to and from the subject site would be significant. He said he had reviewed Mr. Armsworthy's plan for a building and he considered the plan to be satisfactory. He expressed concern that Church Street might become a street of apartment buildings. He expressed his opposition to a high rise building but could accept a building of 8 - 10 units.

Evidence was given by Cyril MacIsaac, a 20-year resident of 168 Church Street. He is in favour of the rezoning to R-3 to permit the construction of an apartment building since it would generate revenue for the Town and because there is a shortage of apartment units in the Town.

On cross-examination by the Appellant's solicitor Mr. MacIsaac agreed that he lives on the "upper end" of Church Street outside the Town limits. He also agreed that Church Street was a fairly heavily travelled street and that he would not be directly affected by the proposed building.

Kevin Riley, the Town's Development Officer and Engineer, was called by counsel for the Town. He is a registered civil engineer. He identified Exhibit M-8 as a photocopy of the application by Mr. Armsworthy to have his property at 85 Church Street rezoned from R-1 to R-3 "to allow the construction of eight flats on the property". He stated that under the R-1 zoning in effect prior to the Council's decision Mr. Armsworthy was entitled to construct a building containing two dwelling units. He identified Exhibit M-5 as the Town's Land-Use By-law and Exhibit M-6 as the Town's Municipal Planning Strategy.

Mr. Riley pointed out that the Town's Land-Use By-law called for a minimum lot frontage of 30.5 metres under the R-3 zone requirements to obtain a development permit to construct an apartment building. 30.5 metres equates to 100.064 feet. He said that at the time of the rezoning application he thought that the minimum lot frontage was 80' for an apartment building. Since the land rezoned by the Town is approximately 82' it does not meet the minimum lot frontage requirement of the R-3 zone for an apartment building as set out on page 42 of the Town's Land-Use By-law (Exhibit M-5).

Mr. Riley said that with respect to the provision of services there was no problem for the Town with either a 6 or 8 unit apartment building for the subject site. He gave his opinion that there was "nothing" in the Town's

M.P.S. to prohibit the rezoning.

Mr. Riley indicated that the developer, Mr. Armsworthy, originally made application to have his property consisting of the vacant lot at number 86 Church Street rezoned to R-3. Since the property consisting of the vacant lot is only approximately 68' wide, Mr. Armsworthy was advised that he would have to have 14' parcel of his property known as number 91 Church Street rezoned in order to provide what at the time of the application was considered by Mr. Riley to be an 80' frontage requirement under the Land-Use By-law. Mr. Riley actually advised Mr. Armsworthy that the minimum requirement for frontage was 80'. Mr. Riley said that it was only at the hearing before the Board that he realized that the figure of 80' was in error and that the minimum frontage actually required is 30.5 metres which is approximately 100 feet.

Exhibit M-8 is a photocopy of the actual application made by Mr. Armsworthy which is dated October 23, 1986. This application does not refer to any specific frontage in the request for rezoning. It simply refers to the property at number 85 Church Street and states that "this rezoning would allow for the construction of 8 flats on the property".

Mr. Riley stated that the application for rezoning was brought before the "Planning Committee" meeting held on October 23, 1986, and he was in attendance at that meeting. Exhibit M-9 is a photocopy of the minutes of a meeting of the Planning Committee held November 3, 1986. These minutes state inter alia: "Mr. Armsworthy's request for rezoning at 85 Church Street from R-1 to R-3 be approved plus approximately 14' on the northern side at 91 Church Street".

Mr. Riley stated that Church Street is classified as a "minor collector street". It was his expressed opinion that the proposed development of a 6-unit apartment building on the subject site would not place the character of Church Street in jeopardy.

Mr. Riley stated that since the Town's Land-Use By-law requires a lot with a frontage of 100' for purposes of obtaining a development permit for an apartment house building that he would not now be able to issue a development permit for this project unless there was a frontage on the street of 100' of land zoned R-3. Mr. Riley stated that it would appear that the next step would be a rezoning of additional lands in order to make up the 100' frontage to comply with the development requirements. Also, he indicated that there would eventually be a requirement for subdivision approval of Mr. Armsworthy's lands so as to separate from Mr. Armsworthy's property at number 91 Church Street the required frontage of R-3 lands to make up the total frontage requirement of 100'.

With regard to parking requirements Mr. Riley stated that parking would be provided at the rear of the building to be erected on the subject site.

On cross-examination by counsel for the Appellant, Mr. Riley admitted that the land rezoned by the Town does not comply with the frontage requirements of the Town's Land-Use By-law.

Counsel for the Appellant directed Mr. Riley to the provisions of Policy P-6 of the Town's Municipal Planning Strategy which sets forth certain criteria to be met in cases where amendments to the Zoning By-law may be passed by the Council within the residential designation for purposes of allowing new multiple dwellings (that is more than two dwellings). In particular Mr. Riley's attention was directed to criteria (vii) of Policy P-6. It reads:

> "That the proposed density is consistent with the general area, and that medium densities are generally located on major collector or arterial roads and that densities generally decrease from higher to lower density uses away from major traffic arteries".

He then asked Mr. Riley to define the meaning of "medium densities". Mr. Riley was unable to supply a definition of "medium densities" as he stated those words were not defined in the Municipal Planning Strategy. Mr. Riley did express his opinion that the proposed density for the subject site was consistent with the general area in compliance with clause (vii) of Policy P-6.

In response to questioning from the Board, Mr. Riley stated that the Town does not employ a planner and does not receive a report from a planner on rezoning applications. He indicated that at times the Town relies on planning information from the Department of Municipal Affairs in

Halifax.

Mr. Riley indicated that there was a demand for apartment units in the Town despite the fact that there had been no application for a development permit for an apartment building in the Town for the past three years while he held the office of Development Officer. He indicated that during his employment with the Town there had been three applications for rezoning lands to R-3 in the Town which were approved. He indicated that the subject case was the third one in the three-year period.

On questioning by the Board, Mr. Riley stated that Mr. Armsworthy, the Developer, would require the approval of the Town Council for the rezoning of some additional lands in order to make up the required 100' frontage before a development permit could be issued.

Mr. Riley pointed out that zoning amendments to permit new multiple family dwellings, that is more than two units, must be considered by the Council on the basis of the policies described in Policy P-6 and the criteria in Section 7.2, Policy P-121, of the Municipal Planning Strategy.

Although Mr. Riley had recommended approval of the rezoning application to the Council based on his understanding that a development permit could be issued to the Developer if the property in question had a frontage on Church Street of 80', he nevertheless indicated that had he been aware of the 100' requirement he would not have recommended to

Council approval to rezone a parcel of land with street frontage of less than 100'.

Counsel for the Town called Stanley MacLellan the Town Clerk to prove the authenticity of the documents filed as Exhibits M-5 and M-6 as well as M-8 to M-14 inclusive.

Counsel for the Town next called Ronald F. MacDonald, the Chairman of the Town's P.A.C. and a member of the Town Council since October 1985. He stated that it was his understanding that at the time of the application to rezone it was within the policies of the M.P.S. He said his committee considered the application and was of the opinion that an 8-unit apartment building would not have any significant impact on Church Street. He thought that the design of the proposed building would not detract from the existing buildings on Church Street. He indicated that had he been aware of the fact that the Town's Land-Use By-law provided for a minimum lot frontage of 100' before a development permit for the construction of an apartment building could be granted, he would not have recommended approval to the Council and would not have voted in favour of the rezoning when it came before the Council, knowing that the property in question was less than 100'.

The Board directed the parties to file post hearing briefs. The brief on behalf of the Town was filed with the Board on April 16, 1987. This brief points out inter alia that if the decision of the Council is confirmed by the Board, a development permit could be issued for the construction of a Triplex Dwelling, a Nursing Home, a Boarding House, Guest Houses and Converted Dwellings as well as Senior Citizen Housing as all of these uses would comply with the Minimum lot frontage requirement of the R-3 Zone. The brief then states that:

> "The re-zoning could still be said to carry out the intent of the Municipal Development Plan 'and' If Mr. Armsworthy wished to continue with the original proposal, he would be required to rezone an additional amount of the adjacent lot".
>
> The Town's brief concludes by stating that:
>
> "There has been no argument made or evidence presented that the proper procedures have not been followed in amending the Land Use By-law. The evidence of those heard by the Board was that the re-zoning would not alter the character of the street, cause increased traffic problems or overburden the sewer and water services. For these reasons the decision of council should be confirmed."

Counsel for the Appellant filed a post-hearing brief dated April 15, 1987, which was received by the Board on April 23, 1987. After pointing out that the Town's Land-Use By-law requires "a minimum of 100 front feet" for the construction of an apartment house building and not the 80 "front feet" thought by the Development Officer to be the requirement at the time of his recommendation to the Council and also pointing out that neither the Development Officer nor the Chairman of the P.A.C. would have recommended approval of the proposed amendment had they been aware of the 100 foot requirement, he comments as follows:

> "In granting the application of the Respondent, Town Council rezoned lands with 82 front feet on Church Street as R-3 residential. The application should never have been recommended to Council

> and had any one been aware of the By-law requirements it would never have been given approval. It is submitted that strict compliance with the terms of the Zoning By-law was a condition precedent to approval of the rezoning application and as that has not been established, the rezoning must be struck leaving it to the Respondent to re-apply".

Counsel for the Appellant further submits that the Council's decision is contrary to the provisions of Section 3.1 of the Town's M.P.S. which states in part on pages 14 and 15 as follows:

> "Certain existing residential areas must be recognized as a resource to be protected and maintained. Non-compatible uses should be restricted from developing within such areas and appropriate buffers should be provided against adjacent incompatible uses. Several older residential neighborhoods of (the) Town and individual homes give the Town a character which cannot be duplicated. The application of programs and policies to restore and maintain these areas are particularly important."

He argues that "The rezoning, if allowed to stand, will permit the development of a land use within an established older residential neighborhood and would appear to offend those policies of the Municipal Planning Strategy intended to restrict non-compatible uses in existing residential neighborhoods.

He also submits that "the rezoning by the Town Council offends against Policy P-6 in that the density is not consistent with other residential development. While it is true that there are 'apartments' located on the street (presumably the multi units referred to by Council in its minutes) it is pointed out that these 'apartments' are in fact converted single family dwellings whose usage as 'apartments' pre-dated the by-law by many years. The outward appearances of these 'apartments' is consistent with the character of the neighborhood. The development of the Respondent, borrowing as it would architectural features from many of the homes in the neighborhood may appear to be a parody of the neighborhood and not really in character with its surroundings".

The Appellant's brief then states at pages 4 and 5 that:

> "The rezoning amendment makes reference to the development of an eight unit apartment building. It is submitted that this constitutes at least medium density which in reference to developments of this type policy P-6 generally requires to be located on major collector or arterial roads. Church Street is neither. Rather it is designated only as a minor collector in the Municipal Planning Strategy. By granting the rezoning application of the Respondent, the Town Council was in violation of policy P-6(vii).
>
> Although Church Street is designated only as a minor collector, there are a number of traffic generating areas in the immediate vicinity of the subject property. Specifically, a church, funeral home and day-care centre. In addition, many of the homes in the area are used as duplexes. The down-town core at its north end and the recently constructed Sobey's store and Mall near Church Street's southern intersection with the Trans Canada Highway contribute to traffic in the street. The insertion of an eight unit apartment building into the street will exacerbate the traffic situation."

The Appellant's brief also refers to a 1984 decision of the Board (William Draper et al v. Town of Antigonish reported in Vol. Three-B/1984 of the Board's decisions), which allowed an appeal against the decision of the Town of Antigonish in rezoning lands situate on the southeast side of Mariner Drive from R-1 to R-3 which would have permitted a 10-unit condominium development on a 17,000 sq. ft. parcel of land. Mariner Drive is a dead-end street leading west off Church Street in the vicinity of the subject property. The brief suggests that "the same considerations which influenced the Board then also apply here".

The owner of the subject land, Allan Armsworthy, filed with the Board a post hearing submission dated March 27, 1987 received by the Board on April 1, 1987. He comments that the Appellant Mrs. Murphy was the only person objecting to the rezoning application while on the other hand two long-time residents of Church Street attended the hearing before the Board and spoke in favor of the proposed development.

Mr. Armsworthy made the following comments respecting the frontage of the rezoned property:

> "In the matter of the 80' frontage, the town development officer admitted the mistake to be his. I had applied for the re-zoning in good faith and Town Council passed it in good faith. I stated at the hearing that I own approximately 200' frontage on Church St. and would be willing to include the additional 20' required to meet regulations. I'm sure the town would not issue a building permit without making sure all regulations were adhered to and satisfied."

It is clear from the evidence that the Town Council rezoned the subject land from R-1 Zone to R-3 Zone in order to permit Mr. Armsworthy to develop the land by constructing an apartment building. The Council had received a recommendation for approval from Mr. Riley, the Town's Engineer and Development Officer who mistakenly was of the belief that the rezoned land had sufficient frontage to comply with the Town's Land-Use By-law. Mr. Riley's evidence at the hearing before the Board was that he would not have recommended approval to the Council had he known that the lot frontage did not comply with the 30.5 metre requirement set out in the R-3 Zone for an apartment building use. Mr. MacDonald, the Chairman of the Town's P.A.C. also stated at the hearing before the Board that he would not have recommended approval to the Council for the same reason.

The only objection to the Town's decision to rezone the subject land is from the Appellant Mrs. Mary Frances Murphy who lives in and owns a dwelling house on a parcel of land directly across the street from the subject site. Mrs. Murphy has resided in her home on Church Street for over 50 years and it is understandable that she objects to a proposed apartment building use for the subject site which she perceives will increase the traffic on Church Street which is presently a heavily travelled collector street. She also is concerned that the proposed use of the subject site will change the character of the street. She considers that both of these reasons will adversely affect the enjoyment of her property and in this regard she may be right.

Although the Appellant's status as an "aggrieved person" was not questioned by Counsel for the Town or by the developer, it is the Board's duty to determine whether the Appellant is an "aggrieved person" in order that the Board can assume jurisdiction to hear and determine the appeal on its merits.

It is the opinion of the Board that the Appellant qualifies as an "aggrieved person" pursuant to Section 63(1)(a) of the Planning Act by virtue of the fact that her pecuniary interest in her property located across the street from the subject property is directly affected by the Council's decision to rezone the subject land to permit an apartment building which will result in increased traffic on Church Street and a higher density use of the subject land which in the Board's opinion will have some adverse affect on the Appellant's property.

The issue, however, for the Board is not whether Mrs. Murphy is adversely affected but whether the decision of the Council reasonably carries out the intent of the Town's M.P.S. The Board is required under the provisions of s.s. (3) of Section 63 of the Planning Act to determine this question. Under s.s. (5) of Section 63 of the Planning Act, the Board is restricted from allowing the appeal "unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The Town's M.P.S. in Section 7.2 provides that the Council be required upon the adoption of the Plan to pass a Zoning By-law for the purpose of carrying out the intent of the Plan. The Council did pass a Zoning By-law on March 17, 1983, which was approved by the Minister of Municipal Affairs on September 23, 1983. A certified copy of the Town's Zoning By-law now known as the Land-Use By-law was filed as Exhibit M-5.

The Town's M.P.S. contains a number of specific policies dealing with amendments to its Land-Use By-law. Policy P-120 states in part that:

> "It is not intended that all land shall be prezoned. Rather, in order to give Council a greater degree of control, the Plan provides that certain land uses shall be processed as amendments to the Zoning By-laws. Such amendments shall be granted only if they meet the policies found within the Municipal Development Plan and the policies included in Section P-121 below, as well as the standards included in the Zoning category to which they will be zoned."

In the opinion of the Board the amendment to the Town's Land-Use By-law which is the subject matter of this appeal does not meet the criteria set out in Section P-121 of the M.P.S. and does not meet the intent of Policy P-120 in that the amendment does not meet the minimum lot frontage standard set out in the Residential Multiple Density (R-3) Zone with respect to apartment buildings. The Town Council apparently thought it was approving the Land-Use Amendment so as to allow the construction of a six-unit apartment building although the developer's application (Exhibit M-8) refers to "the construction of eight flats on the property". The Council Minutes of the public hearing held on December 4, 1986, (Exhibit M-12) indicate that the proposed development was a six-unit apartment building.

The following is the full text of Policy P-121 of the Town's M.P.S.

> "In considering amendments to the Zoning By-law, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:

i) That the proposal is in conformity with the intents of this Plan and with the requirements of all other town By-laws and regulations;

ii) That the proposal is not premature or inappropriate by reason of:

a) the financial capability of the Town to absorb any costs relating to the development;

b) the adequacy of sewer and water services;

c) the adequacy and proximity of school, recreation, and any other community facilities;

d) the adequacy of road networks in, adjacent to, or leading to the development;

e) the potential for the contamination of watercourses or the creation of erosion or sedimentation;

f) the potential for damage to or destruction of historic buildings and sites;

g) preventing access to community facilities and schools.

iii) That controls are placed on the proposed development so as to reduce conflict with any other adjacent or nearby land use by reason of:

a) Type of use;

b) Height, bulk, and lot coverage of the proposed building;

c) Traffic generation, access to and egress from the site, and parking;

d) Open storage;

e) Signs;

f) Any other relevant matters of planning concern; and

g) Provision for buffering, landscaping, screening access control to reduce potential incompatibility with adjacent land uses and traffic arteries.

iv) Suitability of the proposed site in terms of steepness of grade, soil and geological conditions, location of watercourses, marshes, swamps, or bogs, and susceptibility to flooding.

Policy P-122 is also relevant to the processing of amendments to the Land-Use By-law by the Town Council. It states that:

> "In considering amendments to the Zoning By-law, it shall be the intention of Council to:
>
> i) Refer the matter to the Planning Advisory Committee for their report with respect to Policy P-121, Section 7.2, Zoning By-law and any other policies of this Plan which affect the proposed amendment;
>
> ii) Refer the matter to the appropriate provincial government Departments (as identified in this Plan) where special expert advice is required; and
>
> iii) Comply with all legal requirements concerning amendments to the Zoning By-law as set out in Section 38 of the Planning Act."

The Appellant argues that the Board should allow the appeal on the narrow ground that "strict compliance with the terms of the Zoning By-law was a condition precedent to approval of the rezoning application and as that has not been established, the rezoning must be struck leaving it to the Respondent to re-apply". The Appellant is correct in her submission that strict compliance with the requirements of the R-3 Zone has not been established with respect to the developer's proposed use of the subject property for apartment building purposes. However, the approximate frontage of 82' of the rezoned property is in compliance with the requirements of the R-3 Zone with respect to the minimum lot frontage for triplex buildings (20 metres or 65.6166 feet), Senior Citizen Housing (21 Metres or 68.8975 feet and Nursing Home, Boarding Houses, Guest Houses and Converted Dwellings (21 metres or 68.8975 feet). It could therefore be said that there was "strict compliance" with the terms of the Zoning By-law" in the sense that the frontage of the rezoned lands is sufficiently large to permit a number of uses set forth in Table 1 Part 10 of the R-3 Zone shown on page 42 of Exhibit M-5. It is apparent from the evidence that the Council approved the rezoning on the understanding that the developer's intention was to construct a six-unit apartment building although Council must be presumed to have been aware that the lands once rezoned R-3 could be legally utilized by the owner for any of the other allowable R-3 uses or indeed for a larger apartment building use possibly up to and including 12 units if the frontage had been adequate.

It is unfortunate from the developer's point of view that the Town's Development Officer and Engineer was mistaken as to the minimum frontage requirement under the provisions of the R-3 Zone for the construction of an apartment building. Even with a decision from this Board denying the appeal the developer would not have the right to obtain a development permit and a building permit for the construction of an apartment building without having the Council rezone some additional lands so as to give him a minimum frontage of 30.5 metres or 100.064 feet.

The Board is obliged, by virtue of s.s.(3) of Section 63 of the Planning Act, to determine whether the decision of the Council "reasonably carries out the intent of the Municipal Planning Strategy". Because of the fact that the R-3 Zone requirements for the construction of an apartment building have not been met by virtue of the insufficiency of the lot frontage, the Board must conclude that the Council's decision does not meet the intent of the M.P.S. since Policy P-120 of the M.P.S. stipulates that certain land uses including "multiple dwelling uses" shall be processed as amendments to the Zoning By-laws. "Such amendments shall be granted only if they meet the policies found writhin the Municipal Development Plan and the policies included in Section P-121 below, as well as the standards included in the zoning category to which they will be zoned". (emphasis added). The standards of the R-3 Zone with respect to apartment house use have not been met because of the fact that the subject land rezoned by the Council is 82' and the R-3 requirement for this type of use is 30.5 metres or 100.064 feet.

Having determined that the decision of the Council does not reasonably carry out the intent of the Town's M.P.S. the Board is obliged to allow the appeal by reason of s.s. (5) of Section 63 of the Planning Act which states that:

> "The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

It is of significance to note that, based on the evidence at the hearing, the Board might have dismissed the appeal and confirmed the decision of the Council in rezoning the subject property if the rezoned lands complied with the standards for apartments set forth in the R-3 Zone, that is, if the subject lands had frontage of at least 30.5 metres. The only serious reservation about approval of a rezoning to R-3 to permit the construction of an apartment building would be the size and density of the proposed building. In this case the Appellant has given evidence that his present intention is to construct a six-unit apartment building. A six-unit apartment building would appear to be a reasonable number of units in terms of density for the subject area and would not in the Board's opinion be incompatible with the existing uses on that portion of Church Street where the subject land is situate. There are already several six dwelling unit buildings on this street albeit that they are located in older dwelling houses originally constructed as single family dwellings. The proposed density of the six-unit apartment building is in the Board's opinion reasonably consistent with other properties in the Church Street area and meets the requirements of Policy P-6 criteria (vii) of the M.P.S. quoted on page 11 of this decision. Unfortunately, the M.P.S. does not define what constitutes "medium densities" which term is used in Policy P-6(vii). Policy P-6(vii) states that medium densities "are generally located on major collector roads...". It is questionable whether a six-unit apartment house comes within the meaning of medium density as that term would apply to the Town of Antigonish. In the Board's decision of January 11, 1984 respecting the appeal by William Draper et al (Volume Three-B/1984) the Board concluded that a proposed 10-unit condominium apartment building for Mariner Drive was "at least medium density".

It is the Board's opinion that while a six-unit apartment house use for the subject site with at least 30.5 metres of frontage on Church Street would reasonably be within the intent of the M.P.S., a larger apartment house building would conflict with the criteria set out in Policy P-6 (vii) in that its density would not be consistent with the general area which does not have any multi-use dwellings larger than six units and these are located in large converted single family dwellings. It must be noted that Council in approving an amendment to its Land-Use By-law by way of rezoning land from R-1 to R-3 Zone is in effect authorizing any allowable use within that R-3 Zone. It is of concern to the Board that this opens the possibility that the owner of the rezoned property might decide to build a larger unit than the six unit proposed building or he could transfer (after first obtaining subdivision approval) the rezoned land to a purchaser who might wish to construct a larger building than six units and would be entitled to do so. In the case at hand there was no evidence before the Board that Mr. Armsworthy would apply for a permit to build an apartment house with more than six units but that is, of course, a possibility.

If the Town's M.P.S. authorized the Town to enact changes to its Land-Use By-law to permit development by way of agreement, the proposed six-unit apartment building could have been approved by the Town Council pursuant to a development agreement between the Town and the owner. An agreement could be drafted which would clearly limit the number of apartment units to six and would limit the height, size, shape and architectural design of the building to reasonably blend in with the existing buildings on Church Street. Unfortunately, the Town's M.P.S. does not make provision for Council approval of development agreements or as it is sometimes called "contract development". If such a procedure were available the developer in this case would presumably be able to obtain approval of a six-unit apartment building which would be reasonably compatible with existing buildings and the possibility of a building out of proportion to the other buildings on the street would be eliminated.

The Board therefore having considered the evidence adduced at the hearing, having perused the briefs filed by the parties who attended the hearing and having viewed the subject site and adjacent neighbourhood allows the appeal for the reason that the decision of the Council does not reasonably carry out the intent of the M.P.S. and reverses the decision of the Council of the Town made December 15, 1986, amending the Town's Land-Use By-law by rezoning lands on Church Street owned by Alan Armsworthy from R-1 to R-3.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 4th day of May, A.D., 1987.

R.H. BLOIS
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Backman et al. v. City of Halifax

PLANNING--CONTRACT ZONING--APPROVAL OF DEVELOPMENT AGREEMENT TO PERMIT A SIX-STOREY, 74-UNIT APARTMENT BUILDING--WHETHER AGGRIEVED PERSONS--WHETHER REASONABLY CONSISTENT WITH INTENT OF MPS--MUNICIPAL BOARD ACT, S. 25(1)--PLANNING ACT, SS. 33, 34, 71(1),(3),(5)--CITY OF HALIFAX MPS, SECTION 2 POLICIES 1.1, 1.1.1, 1.2, 1.6, 1.7, SECTION 5 POLICIES 1.1.1, 1.1.2, 7.8.2.2

This is an appeal by a number of residents as aggrieved persons from a decision of the Council of the City of Halifax approving an application by S.A. Ltd. for a development agreement authorizing a 74-unit apartment building on South Bland St. in the south end of Halifax. Counsel for the developer questioned the status of the Appellants as "aggrieved persons." The site fronts 201.8 ft. on South Bland St. and is 33,261 sq. ft. in area. It is bounded by Bishop's Row condominium complex, lands of Ace Towing and commercial lands. It is zoned Industrial (C-3), which permits R-1, R-2, R-3, C-1 and C-2 uses as well as "any industrial enterprise except when the operation of same would cause a nuisance or a hazard to the public." The site is covered by the City's Municipal Planning Strategy (MPS) and is, on the Generalized Future Land Use Map in the MPS, designated "Industrial."

HELD: The appeal is dismissed and the decision of Council confirmed.

The issue as to whether one or more of the Appellants are aggrieved persons must be decided before determining whether the decision to approve a development agreement for the subject site reasonably carries out the intent of the MPS. Six of the Appellants are persons aggrieved. They would to some degree lose some of the amenities they presently enjoy, such as some sunlight as well as privacy.

The Board is obliged by ss.71(3) and (5) of the Planning Act to review the proposed development agreement to ascertain whether it is consistent with the intent of the MPS. In respect of a previous proposal, the Board in 1986 found that an 8-storey, 73 ft. high residential/commercial building did not meet the intent of the MPS. The Board found that the building then proposed was not within the height guideline of 6 storeys or 50 ft. (MPS Section 5, Policy 7.8.2.2) and was not compatible with the existing neighbourhood in that it contained an excessive amount of commercial space and was too high in comparison to nearby two and three storey residential properties (MPS City-Wide Objectives Policy 1.1.1). The 6-storey, 59 ft. apartment building presently proposed does reasonably meet the intent of the City's MPS. This project is not to have any commercial component. Although the building's height will exceed the 50 ft. referred to in the guideline, it nevertheless consists of 6 storeys and therefore comes within the guideline. While the developer wishes to develop the site to its maximum permitted density, it has to a considerable degree responded to objections from those at Bishop's Row by siting the proposed building so as to minimize the loss of sunlight and placing it as far from the Bishop's Row properties as reasonable. This proposal is more compatible with Bishop's Row than many "as-of-right" industrial uses. While a lower and less dense building would probably be more compatible with the neighbourhood, the proposed development is nevertheless reasonably compatible with the neighbourhood. This neighbourhood includes industrial and commercial lands south to the grain elevators, including a gasoline service station, a Liquor Commission warehouse, a tourist home and a church and day-care centre. The neighbourhood is one of mixed residential, commercial and industrial uses and the proposed development will to a large degree act as a buffer between Bishop's Row and industrial uses. The Appellants have failed to discharge the onus on them to demonstrate that Council's decision cannot reasonably be said to be consistent with the intent of the MPS.

This is the second appeal respecting this property - See also Volume Five-B/1986, Backman v. Halifax City, NSMB-483-85-P

NSMB-562-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **EDWARD BACKMAN, JOAN BACKMAN, GAYE DRESCHER, SALLY HILL, PAUL WADE, BRIAN WHITE, BETH POULOS** and **DAVID CUNNINGHAM** from the decision of the Council of the City of Halifax made October 30, 1986, approving an application for development by agreement with Southwest Apartments Limited for the construction of a 74-unit apartment building on property known as No. **961 South Bland Street.**

BEFORE: R.H. BLOIS, Q.C., Chairman,
ELIZABETH SALTON, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: SALLY E. HILL, Law Student, on behalf of the Appellants;

PETER J.E. McDONOUGH, Q.C., and ANNE UTECK, for the Developer, Southwest Apartments Limited;

WAYNE ANSTEY, Q.C., for the City of Halifax.

DECISION

This hearing arose out of a Notice of Appeal dated November 27, 1986, filed with the Board on November 28, 1986, under the provisions of s.s. (1)(a) of Section 71 of the Planning Act, S.N.S., 1983, C. 9, by **EDWARD BACKMAN, JOAN BACKMAN, GAYE DRESCHER, SALLY E. HILL, PAUL WADE, BRIAN WHITE, BETH POULOS** and **DAVID CUNNINGHAM** claiming to be "aggrieved persons". The appeal is from the decision of the Council of the City of Halifax made October 30, 1986, which approved an application by Southwest Apartments Limited made pursuant to Section 16 AA(m) of the City's Land-Use By-law for a development agreement authorizing the construction of a 74-unit apartment building in the south end of Halifax on property known as Civic No. **961 South Bland Street.**

The Appellant's Notice of Appeal is filed as Exhibit B-1 and sets forth the following grounds of appeal:

> "(1) The decision of the Council cannot reasonably be said to carry out the intent of the municipal planning strategy and is inconsistent with the intent of the municipal planning strategy, with reference to the following particulars which list is not exhaustive of the said infringements and inconsistencies:
>
> (A) The decision is inconsistent with Policy 7.8.2.2 of Part II, Section V of the Municipal Planning Strategy (M.P.S.) in that the height of the proposed building exceeds 50 feet, and would be inadequately buffered from adjacent industrial uses;
>
> (B) The decision is inconsistent with Section 47(3) of the Land Use Bylaw, in that the planned structure does not meet the angular planes, intended to control the size of buildings;
>
> (C) The decision is inconsistent with Section 48(1) of the Land Use Bylaw, in that the proposed structure exceeds the population density limits therein prescribed;
>
> (D) The decision is inconsistent with Policy 1.1.1 of Part II, Section II of the M.P.S. in that the proposed structure is incompatible with the existing neighbourhood;
>
> (E) The decision is inconsistent with Policy 1.6 of Part II, Section II of the M.P.S., in that the proposed building is out of scale, with respect to the existing neighbourhood and the use of the land is incompatible with the existing neighbourhood;
>
> (F) The decision is inconsistent with Policy

1.7 of Part II, Section II, of the M.P.S., in that the development would amount to a large and socially unjustifiable neighbourhood dislocation, and that the proposed changes to the neighbourhood are unacceptable to the residents;

(G) The decision is inconsistent with Policy 1.1.1 of Part II, Section V of the M.P.S. in that it would permit infill housing inappropriate to the characteristics of the neighbourhood.

(2) The decision to permit this contract development would cause the Appellants undue hardship, and extraordinary and compelling circumstances are present.

(3) Further and other grounds of Appeal may be presented prior to the hearing of this Appeal."

The Clerk of the Board arranged to have the Notice of Hearing advertised by three insertions in the Halifax Mail-Star and the Halifax Chronicle-Herald on February 19th and 26th and March 5, 1987. A copy of the Notice of Hearing that appeared in these newspapers is filed as Exhibit B-3. Sally E. Hill, a Dalhousie Law School student who represented the Appellants and was herself an Appellant at the hearing before the Board tendered her own Affidavit of Service sworn to on March 11, 1987, which stated that she caused to be mailed on February 28, 1987, a copy of the Notice of Hearing to The Honourable David Nantes, Minister of Municipal Affairs, Ronald Simpson, Provincial Director of Planning, Edward Kerr, City Clerk, Peter McDonough, Q.C., Solicitor for the Developer, Southwest Apartments Ltd. and Wayne Anstey, Q.C., Solicitor representing the City of Halifax. In addition Ms. Hill's Affidavit states that she caused a copy of the Notice of Hearing to be delivered on February 28, 1987, to "all property owners within a distance of 500 feet of the subject site" as instructed by the Board.

The Board is satisfied that the Appellants' Notice of Appeal was filed with the Board within the 21-day appeal period set out in s.s. (2) of Section 71 of the Planning Act and is satisfied that the Notice of Hearing was advertised in compliance with s.s. (1) of Section 25 of the Municipal Board Act, S.N.S., 1981, C. 9 and that the Appellants had given Notice of the hearing to the assessed owners of property within a 500' radius of the subject site.

At the commencement of the hearing Counsel for the developer stated that he questioned the status of the Appellants as "aggrieved persons". Ms. Hill on behalf of the Appellants stated that the Appellants intended to prove that they suffered a pecuniary loss because of the lack of compatibility of the proposed development with properties owned by the Appellants and this makes them aggrieved. Mr. McDonough responded that the proposed development approved by the Council is different from the previous one proposed by his client and approved by Council which was the subject of an appeal to the Board resulting in a decision of the Board dated January 7, 1986, by which the Board allowed the appeal and rejected the application for a contract development for the subject site. He also stated that although his client, the developer, had not questioned the status of the Appellants at the previous hearing, he was doing so at this hearing because of the Board's decision in the "Edmonds Grounds" case (Northwest Arm Heritage Association et al, NSMB-496-85-P).

Mr. Anstey, Counsel for the City, supported Mr. McDonough on the question of the standing of the Appellants as "aggrieved persons".

The Board after hearing some evidence on the issue of the status of the Appellants as aggrieved persons with the consent of the parties in attendance at the hearing agreed to proceed with hearing the appeal on its merits and from the evidence would determine whether all or any of the Appellants qualified as "aggrieved persons". The Board is of the opinion that it must hear some evidence as to the proposed development in order to determine the issue as to standing.

The hearing took place in the hearing room of the Expropriations Compensation Board, Centennial Building, 1660 Hollis Street, Halifax, on March 12, 13 and 16, 1987.

Ms. Hill, Mr. McDonough and Mr. Anstey made opening statements on behalf of the parties present at the hearing.

There are two issues to be determined by the Board. Firstly, are all or any of the Appellants "aggrieved" within the meaning of the term "aggrieved person" as that term is used in Section 71(1)(a) of the Planning Act? Section 71(1)(a) states that:

> "Where a council has approved the entering into of an agreement pursuant to Section 55 or 56, the decision of the council may be appealed by an aggrieved person".

Secondly, was the proposed agreement "consistent with the intent of the municipal planning strategy"? This second determination must be made by the Board pursuant to s.s. (3) of Section 71 of the Planning Act.

The subject site known as 961 South Bland Street is located in the South End area of the City which is a large area in the peninsula portion of the City defined in Section V of the M.P.S. at page II - 88. The site is bounded on the west by South Bland Street, on the north by the Residential Condominium complex known as Bishop's Row, on the east by lands of Ace Towing Company and on the south by commercially used lands. The site has a frontage of 201.8' on South Bland Street and is 33,261 sq. ft. in area. This site is in an area of land designated as "Industrial" on the Generalized Future Land Use Map and the site is zoned Industrial (C-3) Zone which permits R-1, R-2, R-3, C-1 and C-2 uses as well as "any industrial enterprise except when the operation of same would cause a nuisance or a hazard to the public."

David Cunningham, one of the Appellants, was called by Ms. Hill as her first witness. He is a teacher and has resided on the ground floor in condominium apartment No. 3 in a two storey building known as civic No. 985 South Bland Street for the past one and one-half years. The building in which Mr. Cunningham resides is located immediately adjacent and north of the subject land. It forms a portion of the Bishop's Row complex located at the corner formed by the south side of Inglis Street and the east side of South Bland Street. Mr. Cunningham stated that his condominium unit has a market value of $70,000.00. He stated that he enjoys good neighbours in a quiet neighbourhood. He enjoys the sun from his apartment which has a deck on the eastern portion of the building in which it is located. He stated that the Bishop's Row property has been designated as "Heritage" property.

Mr. Cunningham feels that he will be losing some of the enjoyment of his property and will suffer a financial loss as a result of the council's decision in approving the proposed apartment building. He expressed the opinion that he will lose some sunlight as the result of the proposed building being constructed. He also considered that there will be a substantial increase in traffic on South Bland Street once the proposed building is constructed. He was of the opinion that his property would diminish in value by $15,000.00. He also thought that the privacy he presently enjoys will be lost.

On cross-examination by Counsel for the developer Mr. Cunningham stated he had not been an Appellant in connection with the previous appeal relating to the subject site. When he purchased his condominium unit he was aware of a proposed development for the subject site but he had made no inquiries as to the specifics of the proposal. He was not aware that the subject property is zoned Industrial (C-3) Zone and that a 35' high industrial building could be built on the subject site as of right. He said he would prefer an industrial building on the subject site to the proposed residential apartment building. He stated that he "likes the area as it is now". He said his major objection to the proposed building was the anticipated loss of investment in his property of $15,000.00.

Mr. Cunningham expressed his opinion that the value of his property would not be affected if the Ace Towing Company, a business presently operating in the general neighbourhood operated its business from the subject site. He said he would not favour a rooming house for the subject site but would not object to an apartment house building up to 35' in height. The deck on Mr. Cunningham's property is approximately 10' from the northern property line of the subject property. He was of the opinion that he would lose a substantial amount of sunlight if the proposed apartment building was constructed.

The next witness to testify was Paul Wade, another Appellant. He is a real estate appraiser employed by Kempton Appraisals Ltd. and resides in Apartment No. 1 at 5476 Inglis Street. His dwelling unit is a portion of the condominium complex known as Bishop's Row. He is the owner of the unit in which he resides and which he values at $129,500.00. He has been the owner of this unit for the past three years. He likes the neighbourhood in which he resides which is close to the downtown business area. He objects to the proposed development because he feels that the proposed apartment building is out of proportion to the neighbourhood and the density would be too great. He expressed the concern that his property may suffer a loss in value as a result of the proposed development. He indicated that a potential purchaser of his property would be negatively influenced by the proposed development. He said it was difficult to place a dollar figure on the loss in value. He expressed his concern that there would be more pedestrian traffic through the Bishop's Row condominium property if the proposed apartment building were constructed on the adjacent site.

Mr. Wade said he would favour low-rise, single family development for the subject site which he felt would maintain or enhance the neighbourhood.

On cross-examination Mr. Wade said his major concern is his perception that his neighbourhood would not maintain its low rise residential character. He also expressed his concern that the proposed apartment building would affect the sunlight he presently enjoys. He said he paid $98,500.00 for his condominium unit. He was not an Appellant at the first appeal to the Board.

The next witness called by Ms. Hill was Gaye Drescher, one of the Appellants, who owns and resides in a condominium dwelling unit known as Apartment No. 4 at 5476 Inglis Street which is a part of the Bishop's Row complex. She has resided at this address for two and one-half years. Her dwelling unit is in the basement and she values it at $55,000.00. She said her property has four windows all facing south in the direction of the proposed development. She objected to the proposed development because she said she would lose some sunlight. She said that the top of her windows are 1½ to 2 feet above ground level. On cross-examination she said that automobiles which park to the south of her property do not affect her sunlight as they are not allowed to park closer than 20' from her windows. She said she would not mind having a 35' high building on the subject site. She expressed the opinion that the proposed development would adversely affect the value of her property.

Sally Hill, one of the Appellants, next gave evidence.

She resides in and owns a second floor condominium dwelling unit in Bishop's Row at 985 South Bland Street. This property directly abuts the subject site. It has a deck on the eastern side which faces east as well as south towards the subject site. She stated that she objects to the proposed development for the reasons expressed by the other Appellants who testified. Ms. Hill is a law student and one of her reasons for purchasing her property is that it is in a quiet neighbourhood where it is easy to study. She likes the location which is close to the downtown area and is also close to the Law School. She purchased her property in May of 1985 for a price of $67,500.00. She was unable to give an estimate of her property's present value although she said that the proposed development would have a detrimental effect on the value of her property. She said that most of her windows face south but on cross-examination she agreed that there was no property right to sunlight. She said her windows are about 8' from the property line. She said that she doesn't have any problem with the fact that the subject site is zoned for industrial uses and she said she is not anti-development. She was asked what legal grievance she had and she responded that her property will be reduced in value because of the loss of light and there would be more noise caused by more people going past her property. She said that she prefers a less dense building for the subject site.

Evidence was also given by Edward Backman, another Appellant. He resides in and owns condominium unit No. 1

at 5480 Inglis Street which is part of the Bishop's Row complex. He purchased his unit in January of 1984. He said that prior to his purchase of this property he made inquiries of City Staff and was advised that there was a 35' height restriction on the subject site. He said he was concerned over the height of the proposed building. He said he purchased his property for $112,000.00 and had agreed to sell it for $129,900.00 with a closing date of April 1, 1987. He said he improved his property by the installation of a laundry area with a cash expenditure of $3,000.00 to $4,000.00. He claims that he is an aggrieved person. He said he would not have been able to sell his property as easily if the proposed development of the subject site had taken place. He said that at the time of the purchase of his property he was aware that the subject site was zoned to permit light industrial uses. He said he was not opposed to the construction of an apartment building for the subject site provided it was within the guidelines set forth in the City's M.P.S. Mr. Backman agreed on cross-examinatior that in close proximity to the subject site are two gasoline service stations, a curling club, a surgical supplies store, a Nova Scotia Liquor Commission warehouse, the Schooner Books store, a submarine sandwich store, a Top Cuts barber shop, the Oriental Restaurant and a grain elevator. Mr. Backman had been an Appellant at the first hearing before the Board relating to the subject site. He expressed concern over the precedent effect of the approval of the proposed development.

Evidence on behalf of the Appellants was given by

Dr. Allan Duffus, a qualified Architect, who is the President of Architectural Resource Consultants Ltd. and a Past President of the Nova Scotia Association of Architects. Dr. Duffus testified that he was familiar with the small scale preliminary drawings of the proposed apartment building. He said he was also familiar with the plans for the previous proposal for the subject site. In the opinion of Dr. Duffus the density of the proposed building exceeds the Land-Use By-law maximum of 125 persons per acre. He arrived at a density figure of 209.12 persons per acre by re-classifying the bachelor units as one bedroom units and the one bedroom units as two bedroom units. His calculations were as follows:

34 units of 1 bedroom x 2 = 68 persons

40 units of 2 bedrooms x 3 = 120 persons

for a total of 188 persons. He then divided the number of persons (188) by the area of the subject site (.889 acres) in arriving at his figure of 209.12 persons per acre. In his opinion the one bedroom units shown on the developer's preliminary plan are capable of being utilized as two bedroom units by including the den areas as habitable room space. He considered the bachelor units as capable of being utilized as one bedroom units for the same reason. Dr. Duffus prepared an enlarged sketch (Exhibit B-20) of the typical bachelor and one bedroom apartments proposed by the developer on which he marked in his calculations of the areas of the various sections of the apartment units.

The City's Land-Use By-law defines "Habitable Room" as follows:

> "'Habitable Room' means any room in a dwelling house, or dwelling unit, with the exception of bathrooms, storage spaces with no windows, or kitchens with a floor area of less than one hundred square feet. Combined or undivided living spaces with floor areas greater than four hundred square feet shall be deemed to be two habitable rooms."

Dr. Duffus was of the opinion that the proposed apartment building was not compatible with the streetscape of South Bland Street and would overshadow the Bishop's Row property. He expressed his opinion that the proposed building would be "happier" if it were only three or four storeys high.

On cross-examination Dr. Duffus agreed that he included circulation areas and closet areas in his space calculations and if these were excluded his square foot area calculations would be less. He also included the areas marked "den" in the preliminary plans.

Counsel for the developer called Charles Hardy, the General Manager of Pat King Appraisals Ltd. He holds a B.Sc. degree and is an accredited real estate appraiser overseeing a staff of twelve appraisers. He has been involved in the valuation of real property since 1972. He said he examined the documentation given to City Council relating to the subject property. He looked at plans of the subject property and visited the subject site. He also reviewed the Board's decision of January 7, 1986, relating to the previous development approved for the subject site by City Council.

Mr. Hardy identified a letter dated March 11, 1987, (Exhibit B-9) he had sent to the developer's solicitor in order to provide him "with our opinion as to whether there will be any detrimentory effect on the values of other properties in the immediate vicinity caused by the development of the proposed building". Mr. Hardy's observations and conclusions are stated in his letter as follows:

> "We have inspected the site of the proposed development on South Bland Street. The property is presently developed with a two storey concrete block industrial/office property with associated parking. The northerly portion of the site is presently utilized by Ace Towing for the storage of cars. The property has an industrial use and conforms with the City Zoning By-law which designates the land as C-3 (Industrial Zone).
>
> The general neighbourhood of the subject property has a mixed use with the subject property and lands to the south and east being used for industrial purposes.
>
> The adjoining properties to the north between the subject property and Inglis Street are multi-family condominium properties having been converted from large old properties.
>
> The properties to the west of South Bland Street are predominantly residential in nature with older single family dwellings and two and three unit apartment buildings. The centre of the block is occupied by the Halifax Curling Club.
>
> The properties to the north of Inglis Street again have a mixed use which includes apartment building developments, retail and commercial uses.
>
> The area of the subject property is overshadowed by the grain elevators. The noise of the grain elevators can be heard within two blocks of the subject property.
>
> We have met with Mr. Kassner of Kassner Goodspeed Associates Ltd., the architects for the proposed development. We have been provided with plans and preliminary specifications of the proposed building and its location on the site.
>
> The proposed building is a six storey, 74 unit apartment building having an 'L' shape and underground parking for 58 cars. The building will be set back from South Bland Street approximately 14 feet at its closest

> point on the southwest section of the site; and approximately 72 feet on the northwest section of the site. The northern section of the site will contain a podium and five foot wall approximately 20 feet from the northermost section of the building with the podium being approximately 13 feet 6 inches from the property line at its closest point. There will, therefore, be a distance of approximately 33 feet between the most northerly portion of the building and the property line.
>
> The northern section of the building will contain no balconies and minimal window area.
>
> We have looked at the general neighbourhood from all possible angles in order to determine as to whether the development will have a detrimentory effect on the value of other properties in the immediate vicinity.
>
> The existing development on the site is of an industrial nature and is not well maintained. A portion of the site together with an adjoining property is used for the open storage of cars which we believe is a detriment to the property values in the area. The site is presently zoned C-3 which provides the constant threat that a more active commercial or industrial use could be made of the site within the zoning by-laws.
>
> It is our opinion that the construction of the proposed building on the site as shown in the architects plans dated April, 1986 would not have a detrimentory effect on the any of the adjoining properties or properties in the immediate neighborhood. The proposed development will more firmly establish the residential nature of the neighbourhood with the elimination of the possibility of further commercial or industrial development on the site. The proposed building will also act as a blind for a number of the properties in the area from the grain elevators to the southeast of the neighbourhood and may act as a buffer to the noise from the grain handling operation. These factors may enhance real estate values in the area."

On cross-examination, Mr. Hardy admitted that he had not inspected any of the Bishop's Row properties or other properties in the subject area internally although he had observed them externally. He stated that he had not attempted to place a value on any of these properties. He did emphasize that in his opinion the proposed development will not diminish the value of any of the Bishop's Row properties. He was asked to describe the noise he had heard from the grain elevators. He said it was a "droning" noise. He also said that the noise and activity which would take place on the subject site during the construction period would not affect property values in the neighbourhood but he also commented that during the construction period would not be a good time to sell property in the neighbourhood. He expresssed his opinion that the proposed development "may enhance real estate values in the area".

On cross-examination by Ms. Hill, Mr. Hardy said that while he didn't appraise any of the residential properties in the neighbourhood of the subject site he nevertheless was able to conclude that these residential properties including those in the Bishop's Row complex would not be devalued by the proposed development. He said the proposed development was relatively tasteful and the existing industrial use of the subject site is an eye-sore. He said he was able to form his opinion based on his experience as an appraiser and from his observations of the subject site and surrounding neighbourhood and from a study of the materials available to him. He said that there was a greater probability of the proposed project enhancing property values than negatively affecting their values.

On re-examination, Mr. Hardy stated that the temporary inconvenience caused by construction on the subject site would be the same whether it was commercial, industrial or residential.

On being questioned by the Board, Mr. Hardy stated that any loss of sunlight to the properties in the Bishop's Row complex caused by the proposed development would be nominal.

Counsel for the developer called Richard Kassner as his next witness. Mr. Kassner is an architect employed by the developer in connection with the proposed development. He testified that the L-shape design of the proposed building and its location on the subject lot as far away from the Bishop's Row site as possible is not the most desirable design and building placement from the developer's point of view because the proposed building is angled away from the sun. He stated that "there are fewer people in his building having access to the sun than in any of the previous proposals we have made. That's because we attempted to soften the impact on the Bishop's Row condominium".

Mr. Kassner said that the proposed building would cast some shadow on the Bishop's row properties. He referred to the development agreement approved by the City which states that the developer must provide a row of coniferous trees adjacent to the landscaped podium at the north end of the subject site where it faces Inglis Street. He expressed his opinion that these trees although they will be a visual barrier between the Bishop's Row properties and the proposed development will have some shadow effect on the Bishop's Row properties. He therefore would not personally want trees in place. He pointed out that there would be a minimum number of windows in the proposed development facing the Bishop's Row properties. He said that closed balconies were designed for the proposed development because of the noise and dust coming from the grain elevators which are located south east of the subject site. He also said that because the balconies were closed it would diminish any noise coming from the proposed building. He also said that the proposed building will shield the Bishop's Row properties from the grain elevator noise. He pointed out that the design of the proposed builidng called for a mansard roof which he said was typical in the neighbourhood. He said this type of roof was not a requirement of the contract and was more expensive than a conventional roof. He said that there would be seven parking spaces above ground and the remaining 56 parking spaces would be below ground. Mr. Kassner stated that the proposed development complies with the City's density requirements.

On cross-examination Mr. Kassner stated that the design of the proposed building was the result of a team effort comprising himself and others from his office. The design was arrived at after a study was made of the Board's previous decision concerning a project proposed for the subject site, after considering the concerns of sourrounding neighbours, and endeavouring to maximize the density of the proposed building. He expressed his opinion that it would be difficult to obtain tenants willing to pay rents which would cover the cost of the project and it would be years before the owner would achieve a profit. He was asked if the design of the proposed building was the most compatible one with respect to the Bishop's Row property. He replied that the compromises made to the design of the building were in favour of the Bishop's Row complex.

Ms. Hill questioned Mr. Kassner at length on the methodology used in calculating the density of the proposed development. Mr. Kassner testified that the development complied with the population density maximum of 125 persons per acre as provided for in Section 48(1)(b) of the Land-Use By-law. Basically, Mr. Kassner's density calculation of 124.1 per person per acre is arrived at by excluding the areas shown on the preliminary plan as dens and also excluding the enclosed balcony areas.

Counsel for the City called Gary Flemming, a planning technician employed by the City in the Development control section of the Development Department. He is responsible for the preparation of staff reports for presentation to the Council respecting proposed development agreements. He obtains comments from other City staff members. He referred to Section 16AA(m) of the City's Land-Use By-law under which the Council may approve a development agreement in areas of the City's "South End" which are zoned for industrial development. Section 16AA(m) reads as follows:

> "(m) Council may, by resolution, under the authority of Sections 33(2)(b) and 34 of the Planning Act, and Policy 7.8.2.2 of Part II, Section V of the Municipal Planning Strategy, permit any specific residential development in areas zoned for industrial development which would not otherwise be permitted by this Bylaw in accordance with said policy;"

Section 16AA(n) makes provision for the registered owner of the land to enter into an agreement with the City. It reads as follows:

> "(n) approval by Council under Clauses (a) through (m) shall only be granted provided that no exemption shall be given to Section 25 of this Bylaw and subject to the condition that the registered owner of the

> land upon which the development is to occur shall enter into an agreement with Council containing such terms and conditions as Council may direct."

Policy 7.8.2.2 of Part II, Section V of the M.P.S. state as follows:

> "Pursuant to Policy 7.8.2 above, the City may consider applications for residential development where the proposed location is adjacent to existing residential uses under the provisions of Section 33(2)(b), and in so doing the City shall consider as guidelines:
>
> (i) that the height of the proposed development is limited to 50 feet or six storeys;
>
> (ii) that family-type accommodation shall not be a requirement for unit mix in such development; and
>
> (iii) that there be adequate buffering from industrial uses which may adjoin the property on which the development is proposed."

Mr. Flemming stated that in his opinion the proposed development meets the requirements of the City's Land-Use By-law with two minor exceptions, namely, the development does not meet the angle controls on the south side and the glazed terraces would be considered as rooms in an "as of right" application.

With respect to density calculations he stated that the density for the proposed development was calculated on the basis of one person per habitable room. He said that in a case where the opening between two rooms is more than 40% of the wall space between the rooms the two rooms are considered as one habitable room for purposes of density calculations unless the total area is greater than 400 square feet.

In connection with the proposed building, Mr. Flemming stated that "in calculating the density we considered the openings to be more than 40% and the area to be less than 400 sq. ft.".

He said that the 40% rule comes from the National Building Code.

With respect to the height of the proposed building, Mr. Flemming stated that the "as of right" height limit for this property is 35' and that the height of the building to the top of the penthouse is 75'. He also stated he does not consider the height of the penthouse in determining the height of the building because of the exception set out in Section 71 of the Land-Use By-law which states that the height regulations set out in the Land-Use By-law shall not apply to certain structures including penthouses occupying less than 10% of the roof area of the building. He then said that the penthouse area is less than 10% of the roof area of the proposed building. He said that the actual height of the building from the ground level to the roof is 59' which in his opinion complies with the height guideline set out in Policy 7.8.2.2. Part II, Section V of the M.P.S. which limits the height to "50 feet or six storeys".

Mr. Flemming stated that there is no problem with respect to the provision of water and sewer services to the proposed development.

On cross-examination by Counsel for the developer Mr. Flemming stated that the proposed development has an excess of open space of 11,000 sq. ft. over the Land-Use By-law requirement. He also stated that Section 16AA of the Land-Use By-law commences with the words "Notwithstanding anything else in this By-law" Council may by resolution do certain things including the permitting of a "specific residential development in areas zoned for industrial development which would not otherwise be permitted by this By-law" in accordance with Policy 7.8.2.2. of Part II, Section V of the M.P.S.

The last witness to testify was Robert W. Robertson, a qualified planner employed by the City in the Development and Planning Department. He stated that he was familiar with the proposed development and with the relevant provisions of the City's M.P.S. He said that the subject site is located in the South End Area of the City and is zoned Industrial (C-3) which permits industrial development as-of-right. He had given evidence at the previous hearing before the Board relating to a proposed development for the subject site consisting of an 8-storey residential and commercial building which he considered not to be consistent with the City's M.P.S. He said that he believes the proposed development which is the subject matter of this appeal does meet the intent of the plan.

In response to a question from the Board, Mr. Robertson said that in the previous application staff had based its density calculations on the basis of .8 persons per habitable room whereas for purposes of the present application staff used 1 person per habitable room. He also stated that the City's Land-Use By-law since 1965 made reference to 1 person per habitable room for density calculation purposes.

Mr. Robertson reviewed the various policies of the M.P.S. relevant to the proposed development. He referred to Policy 1.1.2 of Section V of the M.P.S. which contains detailed objectives and policies for the South End area. Policy 1.1.2

reads as follows:

> "Residential redevelopment shall be permitted in the areas designated pursuant to this Plan and may be encouraged elsewhere provided it is consistent with the policies of this Plan."

Mr. Robertson then stated that "basically what the South End Plan is attempting to do is allocate uses by the Generalized Future Land-Use Map which in this case is primarily industrial but it is also saying in the residential section that there may be residential redevelopment in other selected areas provided there is policy guidance specifically there to authorize it. That is exactly what 7.8.2.2 does".

He also referred to Policy 1.1 of Section II of the M.P.S. which deals with City-Wide Objectives and in particular to "Residential Environments". Policy 1.1 states that:

> "Residential development to accommodate future growth in the City should occur both on the Peninsula and on the Mainland, and should be related to the adequacy of existing or presently budgeted services."

Mr. Robertson referred to Policies 1.2 and 1.6 of Section II of the M.P.S. which read as follows:

> "1.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.
>
> 1.6 The development of vacant lard, or of land no longer used for industrial or institutional purposes within existing residential neighbourhoods shall be at a scale and for uses compatible with these neighbourhoods in accordance with this Plan, and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

He said these policies were referred to in the Board's previous decision. He then commented that in his "view that scale has been defined or refined by the policies of the South End Plan to the extent that I think this particular proposal is in keeping with that policy guidance."

Mr. Robertson considered that the proposed building height of 59' came within the guideline of 50' or 6 storeys provided for in Policy 7.8.2.2 of Section V of the M.P.S.

On cross-examination by Counsel for the developer, Mr. Robertson stated that in his opinion the proposed development was consistent with the intent of the M.P.S.

The issue as to whether one or more of the Appellants are aggrieved persons within the context of s.s.(1) clause (a) of Section 71 of the Planning Act must be determined by the Board before determining whether the decision made by the Council in approving a development agreement for the subject site reasonably carries out the intent of the M.P.S. If none of the Appellants are found to be aggrieved persons then the Board would not have jurisdiction to determine on the merits the second issue.

The Board, after a review of previous Board decisions on the question of what constitutes an aggrieved person and having considered the evidence adduced at the hearing and having studied the post hearing submissions by the parties, is of the opinion that the Appellants David Cunningham, Paul Wade, Edward Backman, Joan Backman, Gaye Drescher and Sally Hill are all "persons aggrieved" and therefore give the Board jurisdiction to determine the second issue on the merits. No evidence was adduced with respect to the nominal Appellants Brian White and Beth Poulos and the Board is therefore unable to make a finding that they are aggrieved persons in this case despite the fact that these persons were given that status in the decision of the Board dated January 17, 1986 (NSMB-483-85-P) relating to a previous development proposal for the subject property. There is an onus on an Appellant to satisfy the Board that he or she is an aggrieved person.

The Board has considered the question of what constitutes an "aggrieved person" in a number of cases including Riverlake (NSMB-448-84-P), Edward Backman et al (NSMB-483-85-P) and Northwest Arm Heritage Association et al (NSMB-496-85-P). Undoubtedly, the Board in both the Riverlake decision and the Northwest Arm Heritage Association decision applied a very restrictive meaning to the words "aggrieved person" and applied the law as enunciated by Coffin J.A. of the Appeal Division of the Supreme Court of Nova Scotia in Halifax Atlantic Investments Ltd. v. City of Halifax et al (7 M.P.L.R. 10) to the facts in these cases.

In the decision written by Mr. Justice Coffin he quoted from the English case of Ex Parte Sidebotham as follows:

> "A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, wrongfully refused him something or wrongfully affected his title to something".

Coffin J.A. concluded that:

> "...after a review of the authorities, it is my opinion that the facts must be within the reasoning of such

> cases as Ex Parte Sidebotham before a person can bring himself within a statutory meaning of a person aggrieved".

At the conclusion of the hearing in this appeal the Board referred Counsel to the 1984 Supreme Court of Canada decision in British Columbia Development Corporation et al v. Friedman, Ombudsman et al (1984) 14 D.L.R. (4th) 129; 11 Admin. L.R. 113. The Board had not been aware of this case at the time of the decisions in Riverlake, Northwest Arm Heritage and Backman. This case arose out of a complaint by a tenant to the Ombudsman of British Columbia. The complainant had to show that he was an "aggrieved person". The Supreme Court of Canada in that case stated per Dickson J. at page 136 of 11 Admin. L.R. 129 that "I would hold that a party is aggrieved or may be aggrieved whenever he genuinely suffers, or is seriously threatened with, any form of harm prejudicial to his interests, whether or not a legal right is called into question."

In the B.C. Development Corporation v. Ombudsman decision, Dickson J. refers to Ex Parte Sidebotham and other cases dealing with the meaning of the phrase "person aggrieved" and states at page 135 that "I find these authorities inconclusive "because none of the cases dealt with a statute "remotely resembling the one at Bar". Dickson went on to state that "The issue can only be resolved by an analysis of the legislation before us in this particular case and the purpose that legislation is designed to achieve".

It is interesting to read the annotation accompanying the decision of the Supreme Court of Canada in the B.C. Development

Corporation case written by Sandra K. McCallum which appears on pages 115, 116 and 117 in 11 Admin. L.R. which reads in part as follows:

> "The Court also rejected the argument that a 'person aggrieved' is a term of art. It accepted instead the notion that a person is aggrieved whenever he genuinely suffers or is seriously threatened. This definition seems the same as that of the Legislatures of Alberta, Newfoundland and Ontario. If 'a person aggrieved' is not a term of art and has a wider connotation, it will hopefully spill over into the very technical area of locus standi and remedies where the concept of a person aggrieved has previously been used to narrow the scope of those eligible to seek relief. This could be the beginning of another move away from technical characterization to more pragmatic reasoning".

In the Board's decision of January 7, 1986 respecting the previous appeal the Board stated at page 48 that "The Appellants who reside in Bishop's Row have a legal grievance arising out of the fact that the approval of the proposed development would have an adverse or injurious effect on them. They are therefore aggrieved persons entitled to present their case to the Board as Appellants pursuant to s.s. (1)(a) of Section 71 of the Planning Act."

The Board in this case is reasonably satisfied without invoking the Supreme Court of Canada decision in British Columbia Development Corporation et al v. Friedman that the Appellants David Cunningham, Paul Wade, Edward Backman, Joan Backman, Gaye Drescher and Sally Hill are aggrieved persons despite the evidence of Charles Hardy, the appraiser, that their properties would not lose value as the result of the proposed development being constructed. All of these Appellants would to some degree lose some of the amenities they presently enjoy if and when the apartment building is constructed. They will lose some sunlight as well as some privacy. Undoubtedly their enjoyment of their properties will diminish with the development of the subject site as proposed even though they might theoretically be even more adversely affected by an industrial as-of-right development on this site. By applying the B.C. Development Corporation case to these Appellants there is no doubt that they are "aggrieved persons".

Section 71(3) of the Planning Act provides that the Board shall determine whether the proposed development agreement approved by the Council "is consistent with the intent of the municipal planning strategy". Section 71(5) of the Planning Act states that "The Board shall not interfere with the decision of the Council unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy."

The Board is therefore obliged to review the proposed development agreement to ascertain whether it is consistent with the intent of M.P.S.

The development agreement approved by the City Council on October 30, 1986, contains the following provisions:

> "1. Southwest Apartments Limited are the registered owners of the lands known as 961 South Bland Street in the City of Halifax, described in Schedule "A" hereto (hereinafter called the 'lands').
>
> 2. The Developer shall construct on the lands a building, which in the opinion of the Development Officer, is substantially in conformance with Plans No. P200/15021 and 15165 filed in the City of Halifax Development Department as Case No. 5050, and shall not develop or use the lands for any other purpose than an apartment/commercial building.

3. If deemed necessary by the Public Service Commission, the watermain in South Bland Street from Inglis Street to the site will be replaced by the Developer.

4. Site drainage plans must be approved by the Engineering Department prior to the issuance of a building permit.

5. The building must meet all the requirements of the Land Use Bylaw with the exception of the angle controls on the south side, height, and the habitable room count as it relates to the 'glazed terraces'.

6. The 'development' shall be completed (completion is defined as fulfilling the terms of the entire agreement) within 3 years from the date of final approval by Halifax City Council or any other bodies as necessary, whichever approval is later, including any applicable appeal periods. If the 'development' has not been completed by the applicable time, this agreement will terminate unless specifically extended, upon request of the applicant, by resolution of City Council and all rights and obligations arising hereunder shall be at an end.

7. Notwithstanding any other provisions of this agreement, the Developer shall not undertake or carry out any development on the lands which does not comply with all City of Halifax laws, including, without restricting the generality of the foregoing, the Building Code Ordinance and the Fire Prevention Ordinance and no permit shall be issued for any such development.

8. The City shall issue the necessary permits for the development upon the expiration of the twenty-one (21) day appeal period under Section 71 of the Planning Act, as the same may be amended from time to time, or upon the withdrawal or dismissal of any appeal which may be taken; provided all terms of this contract have been met and further provided that the City shall not issue any occupancy permit for the development unless and until the development specified in the plans referred to in Section 2 hereof has been completed substantially in accordance with the said plans and the requirements of this have been met.

Time is of the essence of this agreement.

This agreement shall be binding upon the parties hereto and their heirs, successors and assigns."

The Council amended the draft agreement by the inclusion of the following clauses, viz:

> "(1) the proposed row of trees adjacent to the podium where it faces Inglis Street be coniferous; and
>
> (2) a six-foot fence be erected from the entrance of the garage up to the lot line at 985, 981 South Bland Street, similar to the one now erected at 985 South Bland Street".

The Board in its previous decision dated January 7, 1986, allowed an appeal by aggrieved persons who owned property and resided in the adjacent Bishop's Row condominium complex. The proposed development which was the subject matter of that previous appeal was an 8-storey, 73' high residential/commercial property. The Board allowed the appeal because the Board found that the proposed development did not meet the intent of the City's M.P.S. for two main reasons. Firstly, it offended the height guidelines set forth in Policy 7.8.2.2 of Section V of Part II of the M.P.S. which restricts the height of residential development in industrially zoned areas to 50' or 6 storeys. The Board at page 53 of its decision stated that "It is the Board's opinion that the proposed building being 8 storeys or 73' high is not within a height guideline of 6 storeys or 50'". Secondly, the Board found that the Council's decision "does not reasonably meet the intent of the M.P.S. in that the decision does not meet the intent of Policy 1.1.1 of the Residential Environments portion of the City-Wide Objectives and Policies of the M.P.S. Policy 1.1.1 states that:

> "On the Peninsula, residential development should be encouraged through the rehabilitation and infill compatible with existing neighbourhoods; and the City shall develop the means to do this through the detailed area planning process."

The Board in its previous decision concluded that:

> "the proposed development is not compatible with the existing neighbourhood in that it contains an excessive amount of commercial space and is too high in comparison to the two or three storey residential properties to the north and also on the west of South Bland Street".

It is the Board's opinion that the proposed agreement permitting a development of a 6-storey apartment building 59' in height does reasonably meet the intent of the City's M.P.S. and the Board makes this determination pursuant to s.s. (3) of Section 71 of the Planning Act.

In making this determination the Board has carefully considered the proposed development in relation to the intent of the City's M.P.S. and has perused the evidence adduced and the written submissions of counsel as well as having viewed the subject site and surrounding neighbourhood.

The Board in determining that the proposed agreement reasonably meets the intent of the M.P.S. does so on the basis that wherever the term "residential/commercial" appears in the draft agreement set forth in Appendix "B" attached to the Staff Report dated June 25, 1986, signed by Richard Matthews as Acting City Manager, "/commercial" shall be deleted from the term "residential/commercial". The intent of the Board is to ensure that the project approved by Council contains no commercial component.

The Board notes that the Staff Report of June 25, 1986, states in the last paragraph that the draft agreement contains a "two year" time limit for completion whereas the draft agreement in clause 6 provides for a three year time limit.

With respect to the height of the proposed development it is the Board's opinion that the 6-storey building of 59' (from ground level to roof line) does meet the guideline of 50' or 6 storeys set out in Policy 7.8.2.2 of Section V of Part II of the M.P.S. Although the height of the proposed development (59') exceeds the 50' height referred to in the guideline it nevertheless is still a building consisting of 6 storeys and therefore comes within the guideline. If the intention of the guideline was to restrict the building to a maximum height of 50' it could have been so stated.

The developer made its application to the Council with a development proposal for the subject site which is a substantial variation of the previous proposal of 8 storeys including 10,000 sq. ft. of commercial space which received Council's approval but which was found by the Board not to be within the intent of the M.P.S. The developer has scaled down the proposed development from 8 to 6 storeys and has completely eliminated the commercial element of the previous proposal. The developer while admitting it wishes to develop the site to its maximum permitted density has produced a proposal which to a considerable degree responds to the objections of the owners and residents of Bishop's Row. The proposed building is sited on the ground in such a manner as to minimize the loss of sunlight to the Bishop's Row properties and is as far removed from the Bishop's Row properties as could be reasonably expected. While those Appellants who gave evidence would prefer to see either no change on the subject site or a lower apartment building or even a 35' high industrial building on the subject site, nevertheless the proposed development is in the opinion of the Board more compatible with the Bishop's Row properties than many industrial uses which could be established on this site on an "as-of-right" basis. This fact in itself does not justify the approval of the development unless the proposed development agreement is consistent with the M.P.S.

The City Council approved the proposed development agreement pursuant to Policy 7.8.2.2 of Part II, Section V of the M.P.S. which permits any specific residential development in areas zoned for industrial development which would not otherwise be permitted by the Land-Use By-law in accordance with Policy 7.8.2.2. This Policy applies to Planning District 8 of the South End Area (see Map 1 following page II - 105 of the M.P.S.). The subject site is located within District 8 and is immediately adjacent to the existing residential development known as Bishop's Row. Section 16AA(m) of the Land-Use By-law therefore applies to the subject site authorizing the Council to consider an application for residential development which falls within the guidelines set out in Policy 7.8.2.2 of the South End Area Plan. The proposed development agreement must not only meet the guidelines in Policy 7.8.2.2 but it must also be consistent with the intent of the M.P.S. The proposed development does not have to comply with the provisions of the City's Land-Use By-law which would be invoked in an application for a development permit under the as-of-right provisions of the Land-Use By-law.

Thus the Board agrees with the submission of the City that Grounds of Appeal (B) and (C) set out in the Appellant's Notice of Appeal which allege violations of the Land-Use By-law are not valid grounds of appeal. Obviously the process contemplated by Policy 7.8.2.2 is one which in some specific situations permits the Council to approve a residential development agreement in District 8 of the South End Area despite the fact that the proposed development may offend some provisions of the Land-Use By-law. In the case at hand the proposed development does not meet the density requirement of 125 persons per acre set out in the Land-Use By-law nor does it meet the angle controls of the Land-Use By-law for the southern end of the proposed building.

While the developer in this case has redesigned his proposed development to reasonably meet the Board's criticism expressed in its previous decision, the proposed development is nevertheless a relatively high and massive building when compared to the Bishop's Row properties to the north and the residential properties on the west side of South Bland Street. It is of some significance that Robert Robertson, the City's planner whose evidence at the previous hearing before the Board supported the position of the Appellants that the proposed development did not meet the intent of the M.P.S., was of the opinion that the proposed development now under consideration does meet the intent of the M.P.S. The proposed 6 storey, 59' high building does marginally meet the height requirements of Policy 7.8.2.2.

Of some concern to the Board is the question of the compatibility of the proposed development with the existing neighbourhood pursuant to Policy 1.1.1 of the City Wide Objectives and Policies of the M.P.S. although the proposed development does not strictly speaking involve residential development through retention, rehabilitation or infill.

In its previous decision the Board was of the opinion that the proposed development was "not compatible with the existing neighbourhood in that it contains an excessive amount of commercial space and is too high in comparison to the two or three storey residential properties to the north and also on the west side of South Bland Street". In the present proposal there is no commercial space and the height of the building has been reduced to the 6 storey level referred to in the guidelines set out in Policy 7.8.2.2. This in the Board's opinion makes the proposed development reasonably compatible with the existing neighbourhood because it meets the guideline requirement even though a lower and less dense building would probably be more compatible with the neighbourhood. The neighbourhood in which the subject property is located is not restricted to the Bishop's Row properties to the north and the 2 or 3 storey buildings on the west side of South Bland Street but includes all of the industrial and commercial lands on the east side of South Bland Street south to the grain elevators and also includes one of the two gasoline service stations on Inglis Street, the curling club on South Bland Street, the Nova Scotia Liquor Commission warehouse property on Atlantic Street, a tourist home on the south side of Inglis Street at the corner of South Bland Street and a church and day-care centre on Inglis Street. In other words the neighbourhood is one of mixed residential, commercial and industrial uses. While the proposed development is not satisfactory to the Appellants all of whom reside in Bishop's Row it nevertheless is a development which to a large degree will act as a buffer between the Bishop's Row properties and the industrially used properties to the south and east of the subject site and the grain elevators to the south east.

The Board is restricted by reason of s.s. (5) of Section 71 of the Planning Act from interfering with the Council's decision "unless the decision cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy." There is an onus on the Appellants to demonstrate to the Board that the Council's decision cannot reasonably be said to be consistent with the intent of the M.P.S. and the Appellants have failed to discharge that onus. The Board in coming to this conclusion has carefully considered the evidence and all of the grounds set out in the Appellants' Notice of Appeal as well as the submissions of Counsel.

The Appellants in Ground (2) of their Notice of Appeal allege that "to permit this contract development would cause the Appellants undue hardship, and extra-ordinary and compelling circumstances are present". Since this is not an appeal by an applicant under Section 63 of the Planning Act this is not a valid ground of appeal.

The Board, therefore, pursuant to s.s. (4)(a) of

Section 71 of the Planning Act confirms the decision of the council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 27th day of May, A.D., 1987.

RHBlois

R.H. BLOIS, Chairman.

EASalton

ELIZABETH SALTON, Vice-Chairman

RICHARD WELDON, Member.

NOVA SCOTIA MUNICIPAL BOARD

Starvin' Marvin's Co. Ltd. v. Town of Mahone Bay

PLANNING--DEVELOPMENT PERMIT--REFUSAL TO ISSUE BECAUSE OF PROPOSED MPS AMENDMENT--REFUSAL TO ISSUE BECAUSE OF FAILURE TO COMPLY WITH LAND-USE BY-LAW--OF LAYING OUT CERTAIN GREAT ROADS ACT, SS. 1, 2, 7, 10--JUDICATURE ACT--MUNICIPAL BOARD ACT, SS. 4, 25(1), 27(2), 35(1)--PLANNING ACT, SS. 38(2), 55, 56, 76, 77, 78(1),(3), 112(1)--PUBLIC HIGHWAYS ACT, SS. 14, 40 --TOWNS ACT, SS. 145, 166(1), 167--TOWN OF MAHONE BAY MPS, INTRODUCTION, CLAUSES 2.1, 2.2, POLICIES 4.1, 4.5, 4.6, 4.7, 7.0, 7.1, 7.3, 14.7

This is a consolidated appeal from two decisions of the Development Officer of the Town of Mahone Bay refusing to issue a development permit to S.M. Co. Ltd. for an addition to an existing store on Church St. at its intersection with Main St. near the Town Monument. The subject lands are zoned "Commercial" (C) and lie between Highway No. 3 and the waters of Mahone Bay. The Town has a Municipal Planning Strategy (MPS), and the subject property is designated "Commercial (Central Commercial District)" on the Future Land Use Map in the MPS. The reason for refusing a development permit in the first decision is that it "is or may be inconsistent with a proposed land-use by-law." Town Council had published notice of its intention to amend its MPS and Land-Use By-law to severely restrict new construction in the subject area, and Counsel for the Appellant acknowledged that this refusal was proper because of the 120 day freeze imposed by s.76(7) of the Planning Act. The real issue relates to the second refusal, which was based on a failure to meet requirements in the Town's Land-Use By-law relating to setback, off-street parking and loading space.

HELD: The appeal is dismissed and the decisions of the Development Officer confirmed.

Under s.78(3) of the Planning Act the Board must either confirm the decision of the Municipal Development Officer or allow the appeal by ordering that the development permit be granted. The Board is precluded from ordering a permit to be granted if the permit is, inter alia, inconsistent with the Town's Land-Use By-law. The issue therefore is whether the permit is so inconsistent. The second decision, the real issue here, is based on failures to meet the Land-Use By-law. Whether these inconsistencies in fact exist depends on which of two conflicting survey plans, the Eisnor plan or the Berrigan plan, is correct. Counsel for the Appellant and the Town agree that if the Berrigan plan is correct the Appellant is entitled to the development permit. Both counsel also agree that resolution of which plan is correct is an issue for a Court of Law, and that this Board does not have power or authority to make this determination. The Development Officer here may only issue a development permit if she is satisfied the application is consistent with the Town's Land-Use By-law. Where there is a discrepancy between two plans, she may refuse the permit because of the uncertainties involved or may choose the plan she believes correct and issue or refuse the permit accordingly. The

Development Officer here assumed the Eisnor plan to be correct and then properly concluded the permit would not be consistent with the Land-Use By-law. The Board has jurisdiction to determine which plan is correct if, to determine consistency with the Land-Use By-law, it is necessary to choose between the plans. The Board is inclined to the opinion the Eisnor plan is correct, based on Church St. in fact being 66' wide. Even if the Development Officer is not entitled to choose, she is entitled to refuse the permit because of the doubt created by the plan discrepancy. There is an onus on the Appellant of clearly demonstrating that the decisions were wrong and that it is entitled to a development permit because the permit was consistent with the Town's Land-Use By-law. The Appellant has failed to discharge this onus.

NSMB-558-86-P
NSMB-572-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, c.9;

- and -

IN THE MATTER OF: Appeals by **STARVIN' MARVIN'S COMPANY LIMITED** from two decisions of the Development Officer for the Town of Mahone Bay made on October 16, 1986, and March 3, 1987, refusing to issue a development permit for the construction of an addition to the Appellant's property located on Church Street in the Town of Mahone Bay.

BEFORE: ROBERT H.N. BLOIS

COUNSEL: MICHAEL K. POWER, LL.B., for the Appellant;

SAMUEL R. LAMEY, LL.B., and MICHAEL G. BAKER, LL.B., for the Town of Mahone Bay.

DECISION

This is a consolidated appeal under the provisions of Section 78(1) of the Planning Act, S.N.S., 1983, c. 9, by **STARVIN' MARVIN'S COMPANY LIMITED** by which the Appellant appeals two decisions made by the Development Officer for the Town of Mahone Bay on October 16, 1986, and March 3, 1987, refusing to issue a development permit to the Appellant for the construction of an addition to the Appellant's store premises located on the south side of Church Street (also known as Edgewater Drive) at its intersection with Main Street near the Town Monument.

The Appellant filed with the Board two Notices of Appeal. The first one is dated October 29, 1986, and was received by the Board on October 30, 1986. It appeals the decision made by Geoffrey MacDonald as Development Officer for the Town of Mahone Bay made on October 16, 1986, refusing the Appellant's application for a development permit. This Notice is marked Exhibit M-1. At the request of the Board the Appellant filed an Amended Notice of Appeal dated November 18, 1986, received by the Board on November 20, 1986, and filed as Exhibit M-2. A copy of the letter dated October 16, 1986, from Geoffrey MacDonald, the Development Officer to the Appellant refusing the application for the development permit is attached to the Amended Notice of Appeal (Exhibit M-2).

The Amended Notice of Appeal sets forth the following grounds of appeal, viz:

> "(1) the refusal to issue a development permit is wrong in law;
>
> (2) the refusal to issue a development permit is contrary to the previous decision of the same development officer in this same matter under the name of Nor Jak Investments Ltd., agent of the Appellant;
>
> (3) the proposed amendments have no application to the present existing rights of the appellant to expand;
>
> (4) the proposed addition of the appellant is consistent with the urban and rural characteristics of the Town of Mahone Bay;
>
> (5) the proposed addition of the appellant is consistent with the proposed amendments to protect

> the waterfront area;
>
> (6) the proposed amendments were proposed to discriminate against the appellant;
>
> (7) the proposed amendments were proposed as an abuse of process and not in the interests or good planning;
>
> (8) such other grounds as may appear."

The letter dated October 16, 1986, from Geoffrey MacDonald to the Appellant states in part that:

> "As you know, Council published in the County Journal on 18 July an advertisement giving notice of their intention to adopt amendments to the Municipal Planning Strategy and Land Use By-law which would severely restrict new construction in the area between Edgewater Drive and the mean high water mark.
>
> Section 76(7) of the Planning Act restrains me from issuing any Development Permit which is or may be inconsistent with this proposed amendment for a period of 120 days from the publication of the notice of intention.
>
> I must therefore refuse to issue you a municipal Development Permit for your proposed addition to the Starvin' Marvin's building in Mahone Bay."

The second Notice of Appeal marked Exhibit M-3 is dated March 16, 1987,and was received by the Board on March 17, 1987. It appeals the decision of Karen Dempsey as Development Officer for the Town of Mahone Bay made on March 3, 1987, refusing to issue a development permit to the Appellant for the construction of a proposed addition to the Appellant's building in the Town. Both Notices of Appeal relate to the same property and both applications for a development permit were for the same purpose.

The grounds of appeal set forth in the second Notice of Appeal are as follows:

> "(1) the refusal to issue a development permit is wrong in law;
>
> (2) the refusal to issue a development permit is contrary to the previous decision of development officer Geoff MacDonald in this same matter under the name of Nor Jak Investments Ltd., agent of the Appellant (copy attached), and therefore, the Development Officer is now estopped from refusing to issue the development permit;
>
> (3) that undue restrictions are being placed upon the appellant by the Development Officer and the Town of Mahone Bay as he is being asked to meet requirements not demended of other property owners, with respect to the issuing of development permit;
>
> (4) that the Gerald Eisnor survey plan is inaccurate and the appellant's proposed addition does satisfy all of the requirements of the Land Use By-law. Reference is made to the previous Development Permit issued to the Appellant by Geoff MacDonald;
>
> (5) the refusal to issue the Development Permit is to discriminate against the appellant as his proposed addition is consistent with other buildings in the Town of Mahone Bay;
>
> (6) the refusal to issue the development permit is an abuse of process and not in the interests of good planning;
>
> (7) such other grounds as may appear."

The decision of Karen Dempsey is contained in a letter from her to Thomas S.J. Wearing, the President of the Appellant company, dated March 3, 1987 a copy of which is attached to Exhibit M-3 and which reads as follows:

> "Dear Mr. Wearing:
>
> On 16 October, 1986, Geoffrey MacDonald wrote to you explaining that he was unable to issue a development permit for your proposed addition to the Starvin' Marvin's building in Mahone Bay because Section 76(7) of the Planning Act imposed a 120 day freeze on the issuance of development permits in the

> waterfront area. The 120 day freeze has expired and the proposed amendments to the Land Use By-law have not come into effect.
>
> I have reviewed your development permit application of 09 October, 1986. The sketch illustrating your application is based upon a survey plan of 07 March, 1986, by Lester Berrigan. The Town Clerk, Kyle Hiltz, has supplied me with a survey plan of this area dated 18, June, 1986 by Gerald Eisnor. A comparison of the two plans reveals a discrepancy over the location of your property boundary along Route #3 (also known as Church Street or Edgewater Street).
>
> I must refuse to issue a development permit for the proposed addition to your building for the following reasons:
>
> 1. According to the Gerald Eisnor plan this proposed addition does not meet the setback requirements of Section 12.2 of the Land Use By-law.
>
> 2. According to the Eisnor plan, your proposed parking is located on the public street, which is in violation of Section 5.26 of the Land Use By-law, which requires that you supply off-street parking.
>
> 3. Your appliction of 09 October, 1986 does not show any loading space, and so it does not satisfy Section 5.25 of the Land Use By-law, which requires a 12' x 40' loading space for such commercial buildings.
>
> Section 78 of the Planning Act provides that you may appeal this refusal to issue a development permit to the Nova Scotia Municipal Board, within (15) days of receiving this letter."

Attached to the Appellant's second Notice of Appeal (Exhibit M-3) is a photocopy of a letter dated April 4, 1986, from Geoff MacDonald, the then Development Officer for the Town to Thomas S.J. Wearing of Nor-Jak Investments respecting the issuing of a development permit for the subject property. This letter reads as follows:

> "Dear Mr. Wearing:
>
> Re: Development Permit Application, Mahone Bay
>
> I have today issued a Development Permit for your proposed new structure. The Permit has been forwarded to the Town Clerk, who will issue it to you together with the Building Permit.
>
> Your letter of 31 March, 1986 mentioned the possibility of residential use of the second story. Please note that Section 5.26 of the Land Use By-law requires that 1.25 parking spaces be provided for each new dwelling unit. This may not present any difficulties to your proposal.
>
> Please apply for a Development Permit if you intend to change the use of the building from the retail/office space mix.
>
> Your tenants should also be made aware that a Development Permit is required for any new signs attached to the building or erected on the property.
>
> Please give me a call if you have any questions."

Also attached to the Appellant's second Notice of Appeal is a photocopy of a letter dated April 4, 1986 from Geoff MacDonald to Kyle Hiltz the Town Clerk for the Town of Mahone Bay which reads as follows:

> "Dear Mr. Hiltz:
>
> I enclose Development Permit #122, to be issued together with the required Building Permit to Nor-Jak Investments for their proposed new structure."

The hearing of the appeals took place in the Town Council Chambers, Mahone Bay, on April 22nd and April 23rd, 1987.

Counsel for the Appellant and for the Development

Officer as well as the Town agreed that the Board should consolidate the two appeals and have one hearing relating to both appeals.

Counsel for the Appellant filed his own Affidavit of Service (Exhibit M-4) sworn to on April 22, 1987, which states that in compliance with the Board's instructions he served a copy of the Notice of Hearing on Ronald Simpson, the Provincial Director of Planning, The Honourable David Nantes, Minister of Municipal Affairs, the Town of Mahone Bay, the Solicitor for the Town of Mahone Bay, Geoff MacDonell (proper spelling being MacDonald), c/o The Lunenburg District Planning Commission and to those persons within 500 feet of the subject property whose names appear in Exhibit "G" to his Affidavit.

The Clerk of the Board arranged for the publication of the Notice of Hearing in the Bridgewater Bulletin and the Lunenburg Progress Advance by three insertions which appeared on April 1st, 8th and 15th of 1987. Copies of the tear sheets from these newspapers were filed as Exhibits M-5 to M-10 inclusive.

The Board being satisfied that the Notice of Hearing was properly advertised in compliance with Section 25(1) of the Municipal Board Act, S.N.S. 1981, c. 9 and that Notices of the commencement of the proceedings and of the hearing of these appeals had been given to the statutory parties to the appeals in compliance with Section 27(2) of the Municipal Board Act and that the Appellant's solicitor had mailed a copy of the Notice of Hearing to all of those persons that the Board directed the

Appellant to serve with a copy of the Notice of Hearing, proceeded to hear the appeals on the merits.

At the commencement of the hearing Counsel for the parties attending the hearing were requested to make brief opening statements. Mr. Power on behalf of the Appellant stated that the Appellant had been unfairly denied a permit by the Development Officer. He indicated that a development permit respecting the subject property had in fact been issued to Nor-Jak Investments Ltd., a company associated with the Appellant Company, and that this permit had been revoked by the Development Officer. Mr. Lamey on behalf of the Town and the Development Officer stated in his opening remarks that the Appellant owned insufficient lands so as to meet the set-back requirements of the Town's Land-Use By-law and therefore the Development Officer properly refused to issue a development permit. He said that a plan of survey had been prepared on behalf of the Town which would be introduced in evidence in support of the allegation that the appellant had insufficient lands.

Section 76 of the Planning Act relates to the issue of a Municipal Development Permit. It reads as follows:

> "MUNICIPAL DEVELOPMENT PERMIT
>
> 76(1) Where a council has adopted a land-use by-law, a municipal development permit shall be required before any development is undertaken, but the by-law may specify developments for which no municipal development permit is required.
>
> ISSUE OF PERMIT
>
> (2) A municipal development permit shall be

issued for a proposed development if the development conforms to the land-use by-law or to the terms of an agreement in force pursuant to Section 55 or 56.

CONFLICT WITH PLANNING STRATEGY

(3) A municipal development permit shall not be refused by reason only that it conflicts with a planning strategy.

CONFLICT WITH PROPOSED REGULATION

(4) No municipal development permit shall be issued which is inconsistent with a proposed provincial land-use regulation for a period of one year from the date of the written notice of the Minister pursuant to Section 10.

WHEN PERMIT MAY BE ISSUED

(5) No municipal development permit shall be issued pursuant to a resolution of the council approving the entering into of a development agreement or an agreement for the establishment of a comprehensive development district until

(a) the time for appeal has elapsed; or

(b) any appeal has been disposed of and the agreement has been confirmed by the Board.

AMENDMENT TO LAND-USE BY-LAW

(6) No municipal development permit shall be issued pursuant to an amendment to a land-use by-law until the time for appeal has elapsed or the appeal has been disposed of.

PROPOSED LAND-USE BY-LAW

(7) No municipal development permit that is or may be inconsistent with a proposed land-use by-law or any proposed amendment or revision thereof, shall be issued for a period of one hundred and twenty days from the publication of the first notice,

advertising the intention to adopt or amend.

PERMIT TO BE ISSUED

(8) If the proposed provincial land-use regulation or land-use by-law, or revision or amendment thereof, has not come into effect after the expiry of the time specified in subsection (4) or (7), as the case may be, the municipal development permit shall be issued if it conforms in all other respects to the land-use by-law.

CONTENT OF LAND-USE BY-LAW

(9) The land-use by-law may prescribe

(a) the form of application for a development permit; and

(b) the content of a municipal development permit."

Sections 77 and 78 of the Planning Act make reference to the appointment of a Municipal Development Officer and his duties and to the right of appeal from his decision. Sections 77 and 78 read as follows:

"MUNICIPAL DEVELOPMENT OFFICER

77(1) A council which has adopted a land-use by-law shall appoint a municipal development officer, who shall be responsible for the administration of the land-use by-law and the issuing of municipal development permits.

COMMISSION EMPLOYEE

(2) Where the municipality participates in a commission, the council may appoint a development officer in the employ of the commission to be the municipal development officer.

SUBSTITUTE

(3) A council may from time to time authorize any other person to act in the

municipal development officer's stead.

COMPLETENESS OF APPLICATION

(4) Within fifteen days of receiving an application for a municipal development permit, the municipal development officer shall inform the applicant whether or not his application is complete.

GRANT OR PERMIT

(5) Within thirty days of receiving a completed application, the municipal development officer shall either grant the municipal development permit or inform the applicant of the reasons for not granting the permit.

APPEAL

78(1) The refusal by a municipal development officer to issue a municipal development permit may be appealed by the applicant therefor.

SERVICE OF NOTICE OF APPEAL

(2) A notice of appeal shall be served on the Board within fifteen days of the date that the written decision of the municipal development officer is served on the applicant.

DECISION BY BOARD

(3) The Board shall

(a) confirm the decision of the municipal development officer; or

(b) allow the appeal by ordering that the permit be granted, but no permit shall be granted that is inconsistent with the land-use by-law, an agreement entered into pursuant to Section 55 or 56, or a provincial land-use regulation."

The Town has a Revised Municipal Planning Strategy and a Revised Land-Use By-law adopted by the Town Council on May 8, 1984, and approved by the Minister of Municipal Affairs on June 15, 1984. Copies of these documents are filed as Exhibit M-33. The Town first adopted a Municipal Development Plan in 1975.

The M.P.S. states in clause 2.1 of its Introduction that:

> "The Municipal Planning Strategy for the town of Mahone Bay shall be regarded as the policy framework by which Mahone Bay Town Council shall guide and control development, and land use, and other matters of interest to the Council within the terms of Section 38(2) of the Planning Act."

Clause 2.2 states that the Land-Use By-law shall be the means by which Town Council shall carry out the intent of the M.P.S. for land use and development purposes.

Some relevant general policies set out in the Town's M.P.S. are the following:

> "4.1 It shall be the intention of Town Council to provide a planning framework wherein the established sector of the community can grow and prosper and new development will be accommodated in an orderly manner."
>
> "4.5 It shall be the intention of Town Council to control land use and development in a manner that will enhance and preserve the quality of the living environment and the established character of the Town.
>
> 4.6 It shall be the intention of Town Council to encourage development and employment opportunities in an attempt to stabilize the Town's declining population in order to maintain and enhance its viability as a Town and as a community.
>
> 4.7 It shall be the intention of Town Council to encourage development that is

> compatible with the town's role as a scenic residential community orientated toward tourist activity."

"Commercial Development and Land-Use" Sections are as follows:

> "7.0 Traditionally, Mahone Bay has functioned as a commercial and service centre for the surrounding local area. In recent years, however, new commercial development has been increasingly oriented to the growing tourist trade. Further growth in the tourism sector is anticipated and welcomed as a way of improving the Town's economic base while reinforcing its historic character. While most commercial activity is located in the central commercial district and the secondary commercial area on West Main Street, it is recognized that Main Street and Edgewater Drive, throughout their entire length offer some attraction to new business. Proposals for commercial development on these streets by Development Agreement will be considered on their merits.
>
> POLICIES
>
> 7.1 It shall be the policy of Council to designate the central commercial district and the outlying commercial area on West Main Street at Clearway, as commercial areas where a broad range of retail and service activities shall be permitted."
>
> "7.3 Business uses shall be required to provide off-street parking for customers so as to minimize congestion created by on-street parking."

Policy 14.7 of the "Implementation" Section of the M.P.S. provides that the Development Officer of the Town "shall be responsible for the administration of the Land-Use By-law" and "shall issue or deny permits" under the terms of the Land-Use By-laws and the subdivision regulations.

The subject lands are located in an area designated

"Commercial (Central Commercial District)" shown on the Town's Future Land Use Map (Map 2). These lands are in an area zoned "Commercial" (C) as shown on the Town's Zoning Map (Schedule "A" to the Land-Use By-law).

Ten persons testified at the hearing and forty-two exhibits were filed. Much evidence was given as to which of two recent plans of the subject property correctly depicts the location of the street line adjoining the property. The plan by Lester W. Berrigan N.S.L.S. dated March 7, 1986, filed as Exhibit M-30 prepared on behalf of the Appellant has a note on it indicating that the location of street lines shown on the plan were scaled from a Plan of Survey by S.E. March, P.L.S. dated May 27, 1928, registered in Book 97, Page 597. Church Street shown on the Berrigan plan appears to be a portion of Public Highway No. 3. The Berrigan plan shows the subject property as being within a foot or two of the edge of the paved surface of the street. The plan by Gerald D. Eisnor, N.S.L.S. dated June 18, 1986, filed as Exhibit M-36, prepared on behalf of the Town, shows both "Highway Limits", and also the edge of the paved surface and the location of the subject property in relation to these lines. Both plans show the subject site as lying between the waters of Mahone Bay on the south and the edge of the paved portion of Church Street on the north. The Eisnor plan, however, indicates that a portion of the subject site is within the street limits of Church Street.

Under the provisions of s.s. (3) of Section 78 of the

Planning Act the Board's decision must either (a) confirm the decision of the Municipal Development Officer, or (b) allow the appeal by ordering that the permit be granted. The Board is precluded under clause (b) of s.s. (3) of Section 78 from ordering a permit to be granted if the permit is inconsistent with the Town's Land-Use By-law, an agreement entered into pursuant to Section 55 or 56, or a provincial land-use regulation. In this case there is no agreement entered into pursuant to Sections 55 or 56 and there are no provincial land use regulations in effect. The issue therefore is whether the permit applied for is inconsistent with the Town's Land-Use By-law.

The reason for the decision of Geoff MacDonald, the Development Officer for the Town at the time of the Appellant's first application for a development permit, arises out of the provisions of Section 76(7) of the Planning Act which in effect prohibits the issue of a development permit "that is or may be inconsistent with a proposed land-use by-law." As may be seen in the letter dated October 16, 1986, from the Development Officer to the Appellant the Council had published an advertisement on July 18, 1986, "giving notice of their intention to adopt amendments to the Municipal Planning Strategy and Land-Use By-law which would severely restrict new construction in the area between Edgewater Drive and the mean water mark". Edgewater Drive is also known as Church Street and is a portion of Provincial Highway No. 3. These proposed amendments were not approved by the Minister of Municipal Affairs.

The first witness called by Counsel for the Appellant was Thomas S.J. Wearing, the President of Starvin' Marvin's Company Ltd. and also the President of Nor Jak Investments. He explained that Starvin' Marvin's Company Ltd. is the owner of a number of convenience stores and Nor Jak is a holding company for the real estate on which the Starvin' Marvin stores are located. He stated that the subject property in Mahone Bay was acquired about four years ago by Starvin' Marvin's Company Ltd. He said the company purchased the property on the understanding that the building on it could be extended. Mr. Wearing identified Exhibit M-12 as a copy of a letter dated August 4, 1983 from the Appellant's solicitor to the Town of Mahone Bay requesting answers to three questions. One of these questions is: "Are there any restrictions on a construction of premises on the adjacent lot known as the Eisenhauer lot? And if there are, is there any restriction on adding to the existing Ritcey and Hayward building and at the same time, using the Eisenhauer lot?" Mr. Wearing also identified a copy of a letter (Exhibit M-15) dated August 22, 1983, from the Lunenburg District Planning Commission to the Appellant's solicitor stating as follows: "Yes there are restrictions in the form of set-back and other requirements of which I enclose a photocopy for your convenience. If you were to add a section to the present Ritcey and Hayward building that crossed the present lot boundary, it would first be necessary to consolidate the lots".

Mr. Wearing also identified Exhibit M-29 as a metes and bounds description of the lands purchased by the Appellant on Church Street in the Town. This Exhibit contains three parcels of land, the first of which is the most westerly portion of the subject lands. These three descriptions refer to a plan of survey prepared by S.E. March and dated May 27, 1928, a photocopy of which is filed as Exhibit M-11. This plan depicts a shop on the western end of the first described lot. The other two parcels shown on M-11 together with the first parcel comprise the entire property presently owned by the Appellant. Mr. Wearing then identified Exhibit M-16 as a copy of a letter dated October 8, 1985 from the Appellant's solicitor to the Town. The purpose of this letter as stated in the letter was to investigate the possibility of Nor-Jak Investments Ltd., a company whose principle owners are Tom and Rene Wearing,"being issued a building permit so that an addition can be made to the present Starvin' Marvin's building. The Starvin' Marvin's building is approximately 40 feet long and 30 feet deep. The addition would be approximately 100' long and 40 ' deep. The addition would be two storeys and its purpose is to provide for five or six retail outlets on the ground floor and offices on the upper floor. It is proposed that the addition and Starvin' Marvin's would be one building but that each retail outlet would be unique with a 'different looking front' and colour". A sketch of the proposed building design was enclosed with the letter. A reply to that letter dated October 15, 1985, (Exhibit M-17), and signed by Geoff MacDonald the

Development Officer was sent to the Appellant's solicitors stating inter alia that "your letter does not contain enough information to allow me to determine whether your client's proposal conforms with the Land-Use By-law. Please complete the enclosed application form and return it to this office." The letter also states that "I am particularly concerned with your client's proposed location for the addition. The Land-Use By-law requires setbacks from property boundaries as indicated in the enclosed extract from the By-law. Please enclose a sketch showing the location of the building in relation to the boundaries of the lot. If there is doubt as to the extent of your client's ownership, and the location of their property lines near tidal water, watercourses, or street limits, a survey may be required to demonstrate that the proposed development conforms with the by-law.

In drawing up your proposal your clients shall also take into account the requirements for parking space contained in Sections 5.26 and 5.27 of the Land-Use By-law (copy enclosed)."

Mr. Wearing referred to a letter (Exhibit M-18) dated January 14, 1986, from Geoff MacDonald, Development Officer to the Appellant's Solicitors acknowledging the receipt of a "sketch" prepared by Lester Berrigan respecting the subject property. This letter re-iterates the writer's comments made in his letter of October 15, 1985 and noted that "If the building is intended to cover an area which crosses over the existing lot lines, it will be necessary to consolidate those lots into one lot in order to maintain the required clearances from the boundaries of the lot on which the building is ultimately sited."

Mr. Wearing identified as part of Exhibit M-19 a letter dated February 10, 1986, from himself on the letterhead of Nor-Jak Investments Ltd. to Geoff MacDonald enclosing a development permit application "to construct an addition to our existing property, located at Main Street, Mahone Bay". A copy of the application forming part of Exhibit M-19 indicates that the permit was "to completely renovate existing structure and to extend same 115 feet into vacant lot presently used for parking. This extension to be divided into six retail outlets with six office spaces on 2nd floor".

Mr. Wearing subsequently received a letter (Exhibit M-20) dated February 20, 1986, from Geoff MacDonald, the Development Officer pointing out that:

> "1. The property is located in the Commercial (C) Zone where your proposed mix of retail and office uses is permitted.
>
> 2. The Land Use By-law requires certain distances between a building and the boundaries of the lot on which it is located. It appears that your property consists of at least three lots and that your proposed building crosses their boundary lines. I am not prepared to issue a permit until these lots are consolidated.
>
> 3. Your proposed rear yard is shown as approximately four feet at the southwest corner of the proposed building as shown on the enclosed photocopy. The required minimum is ten feet.
>
> 4. The Land Use By-law requires a minimum of one parking space for each 300 square feet of retail or of other commercial space.

> Your proposed addition appears to have approximately 7,000 square feet of gross floor area in two floors which would require 23 parking spaces of 10' by 20' size. Only eighteen spaces are shown on your plan.
>
> I am not prepared to grant a Development Permit for your proposal until these deficiences are corrected."

Mr. Wearing stated that these deficiencies were corrected and a development permit was issued to Nor-Jak Investments Ltd. No development was undertaken by Nor-Jak with respect to that permit. A letter dated June 19, 1986, from Geoff MacDonald to Nor-Jak revokes the permit issued to Nor-Jak. This letter reads as follows:

> "I have received information from the Town Clerk that Edgewater Drive (also called Church Street) has a width of 66 feet.
>
> Development Permit #122 was issued on 04 April, 1986 to Nor-Jak Investments for an addition to the building which houses the existing Starvin' Marvin's Store.
>
> A survey plan by Lester Berrigan of the Starvin' Marvin's Company lands dated 07 March, 1986 shows the street boundary line approximately fifteen feet from the centreline of the street and it is on this plan that Development Permit #122 is based.
>
> However, based on Mr. Hiltz's information, I believe the street to be built approximately in the centre of a 66 foot wide right-of-way, which would place the boundary line approximately thirty-three feet from the street centreline.
>
> This is quite different from the boundary shown on Mr. Berrigan's plan, and has a great effect upon the proposed addition as well as the arrangement of the parking which the Land Use By-law requires for new commercial development.

> It appears therefore that Development Permit #122 was issued on mistaken or false information, and could not have been issued if this information had been revealed at the time of application.
>
> I am therefore revoking Development Permit #122 which was issued on 04 April, 1986 to NOR-JAK Investments Ltd. This permit is not in effect from this date onward and any construction which is commenced without the issuance of a new permit would be in violation of Section 76(1) of the Planning Act."

Mr. Wearing stated that on October 10, 1986, he made another application to the Development Officer in the name of the Appellant, Starvin' Marvin's. Exhibit M-27 is a photocopy of a letter from Mr. Wearing to "Jeff Macdonald" Development Officer c/o Lunenburg County Planning Commission enclosing "an application for a Development Permit to allow us to build on to our existing building at 8 Edgewater Street, Mahone Bay, presently occupied by our store". A copy of the application by "Starvin' Marvin's Convenience Store Limited" is attached to Mr. Wearing's letter. The Development Permit application describes the new construction as follows:

> "To completely renovate existing structure and to extend same 115 feet into vacant lot. This extention to be divided into six retail units.
>
> Our intention is to construct a building which would complement surrounding existing structures. Copy of survey showing where new construction to be located is presently at your office with previous application on same property summited under Nor-Jak Investments."

Mr. Wearing explained that the purpose of the October

10, 1986 application for a development permit was exactly the same as the previous application by Nor-Jak. He said that both companies were owned by himself and usually the title to the land on which a Starvin' Marvin's Store was located was vested in Nor-Jak.

Mr. Wearing was referred to Exhibit M-28 a copy of a letter dated March 3, 1987, from Karen Dempsey to himself in which Ms. Dempsey sets out her reasons for refusing the permit application of October 9, 1986, and to reason No. 3 in that letter which indicates that the application does not show any loading space whereas Section 5.25 of the Land-Use By-law requires a 12' x 40' loading space. Mr. Wearing said this was not a requirement for the previous permit application and he therefore did not show it on the plan attached to the application. However, he said there was in fact space 14' x 56' for this purpose. He identified some buildings shown in photo marked as Exhibit M-31 as the type of individual attached shops proposed for the subject site.

Mr. Wearing identified the vacant land shown in photo #3 of Exhibit M-32 as the area where the Appellant proposed to build.

On cross-examination Mr. Wearing said that prior to the closing transaction involving the purchase of the subject property he had not provided the Development Officer with details of his proposed development although his solicitor had made general inquiries to the Planning Commission. He did not have a land survey made at the time of purchase. The description in the Appellant's deed referred to a 1928 plan of survey. It was not until the time of the application by Nor-Jak that he had a plan of survey prepared by Lester Berrigan.

Mr. Wearing stated that the existing store building owned by the Appellant was approximately 1000 sq. ft. and that the proposed additional space would be 6300 sq. ft. for a total of 7300 sq. ft. He said that the difference in the width of the street in front of the subject property as shown on the Berrigan and Eisnor plans was the main obstacle in getting a development permit. He also referred to an old By-law of the Town prohibiting buildings being erected on lands lying between the shore of Mahone Bay Harbour and Edgewater Street from Keddy's Bridge to the Western boundary line of the property now or formerly owed by Phillip Eisenhauer near the junction of Route 3 and 3A. By-law No. 15 was amended by the Town Council on February 14, 1967 and approved by the Minister of Municipal Affairs on May 16, 1967. A copy of the amendment to By-law No. 15 is contained in Exhibit M-35. Mr. Wearing stated that the prohibited area included a portion of the subject property.

The Town Council passed a motion at a Special Meeting held on April 29, 1986 stating that:

> "The Amendment to By-law 15 entitled Building Regulations of the Town of Mahone Bay be submitted to the Lunenburg County District Planning Commission for incorporation into the Town of Mahone Bay First Revised Municipal Planning Strategy and Land Use By-law".

The Town Clerk by letter dated May 2, 1986 (Part of Exhibit M-35) wrote to Geoff MacDonald the Development Officer c/o The Lunenburg County District Planning Commission, advising him of the Council's Motion passed April 29, 1986 and asked him to "give this matter your earliest attention as the next regular meeting of Council is scheduled for May 13, 1986".

Mr. Wearing was shown a copy of the survey plan prepared for the Town by Gerald D. Eisnor (Exhibit M-36) and he agreed that if this plan was correct the proposed parking spaces for the subject property would encroach on the highway limits. He also said if it were correct "it would wipe out half the Town as well". This plan shows Highway No. 3, also referred to as Church Street or Edgewater Street as having a width of 66'.

The next witness called by the Appellant was J. Gordon Ritchie, a former owner of the subject property from 1970 until he conveyed it to the Appellant about four years ago. He said he was familiar with this site for 50 years. He said it had once been used as a Texaco service station. Mr. Ritchie is a former Town Councillor and Justice of the Peace. He had the subject property surveyed by a Matthew MacMullin, an employee of the Department of Highways. He did not produce a copy of the MacMullin survey plan. He had renovated the former service station building and made it into an office building. He said he operated a real estate business at this site. He was asked if he was aware of any building restriction on the vacant portion of the subject property. He said he was aware of a Town By-law which forbids new building on Edgewater Drive but he was not aware of any restriction in the By-law for adding to an existing building in this area. He was asked if he had any knowledge of a so-called 66' right-of-way running through the Town. He replied that after "selling an awful lot of property along these streets I have never had a surveyor tell me that they had a 66' right-of-way. This is a completely new picture of what the Town claims it owns as far as I'm concerned". He said if the street was 66' wide the fuel pumps which had been in use at this site "would have been out in the middle of the street". He said he had paid someone to dig up these pumps which he said were on his property when he was the owner of the subject site.

On cross-examination Mr. Ritchie agreed that many properties in Lunenburg County encroached on highway limits.

Evidence on behalf of the Appellant was given by Lester W. Berrigan a Nova Scotia Land Surveyor who has been licensed since 1972. He was retained in the fall of 1985 by Mr. Wearing to survey the subject property. He first obtained a copy of the Appellant's deed. He identified Exhibit M-29 as a copy of the description from the deed. He also obtained a copy of the 1928 plan of the subject property prepared by S.E. March in 1928 which is referred to in the description. A photocopy of this plan is filed as Exhibit M-37. He then did his survey. He concluded that after his initial survey that "the retaining wall adjacent to the canal or brook and the bridge were in the same location as established by S.E. March in 1928. I basically based my complete survey on the location of that retaining wall and all courses and distances appeared to fit very well to the location of that".

Mr. Berrigan identified Exhibit M-30 as a plan of survey of the subject property dated March 7, 1986 prepared by him showing the three lots described in the Appellant's deed. He said he requested through the District Planning Commission the consolidation of the three lots into one single lot A. There is an endorsement of the plan signed by Geoff MacDonald, Development Officer dated April 4, 1986 that the plan was approved for lot A only. Mr. Berrigan identified Exhibit M-11 as another photocopy of the March plan of 1928.

Mr. Berrigan was asked on direct examination to explain what he did with respect to the street line. He replied that the 1928 plan (Exhibits M-11 and M-37) "had the designation on to it of approximate street line and it is a curved surface as indicated on the plan and they were defined or the street was defined as a certain distance from the brook or canal and simple as can be I established the brook and canal, established the point from the street the same distance as called for in the S. Edgar March plan, laid a curve on his plan and calculated the location of the street line".

Mr. Berrigan stated that Church Street or Main Street in front of the subject lands is clearly marked as 38' wide on the March plan of 1928 and he discussed the March plan with Mr. MacDonald, the Development Officer, prior to the completion of his survey plan.

He testified that when surveying property in the down town area in cases where there is no previous survey information as to the location of street boundaries he shows the street as 33' from the centre line of the street. He said that if 33' from the centre line of the street were taken as the street boundary there would be a great many properties in the Town which encroached on the street.

Mr. Berrigan was asked to comment on the fact that Mr. Eisnor's plan of the subject property (Exhibit M-36) shows Church Street as being 66' wide. He said he disagreed with the street location shown on the Eisnor plan. He said that all the survey markers that were found "were out just behind the sidewalk and not 33' from the centre. He said that previous surveys had shown the street not to be 66' wide.

On cross-examination Mr. Berrigan said that he had not done any specific research of the street to determine if it had a particular width. He agreed that if the 1928 plan by March was wrong, his plan would also be wrong. Mr. Berrigan stated that the March plan was the best evidence he had as to the boundaries of the subject lot. He was referred to a copy of a plan of survey prepared by him, dated June 8, 1984 (Exhibit M-38) showing the St. James Anglican Church property on Edgewater Drive (Highway No. 3) in the Town of Mahone Bay. This plan depicts the street as having a width of 66'. He said this property was about 500' to the east of the subject site and had frontage on the same road as the subject property (Church Street being also called Edgewater Drive). Mr. Berrigan justified the fact that the plan of the Anglican Church property shows the street width to be different from the width of the same street bordering the subject site by the fact that he did not have any survey information to establish the width of the street at the Anglican Church site. Mr. Berrigan stated that despite this discrepancy in the street width both of his plans could be correct.

Mr. Berrigan, in concluding his testimony stated that in his opinion the March Plan of 1928 being 59 years old was sufficient to establish the width of the street at the subject site.

The next witness to testify was Philip Lohnes a retired gentleman and a former mayor of the Town. He resides on West Main Street in the Town and appeared at the hearing under s.s. (3) of Section 27 of the Municipal Board Act, S.N.S. 1981 c. 9. He said he was concerned about what was taking place on Edgewater Street. He said when he was on Council there was an unwritten law that there be no building on Edgewater Street. He is opposed to any development on the subject site.

On cross-examination Mr. Lohnes who is 69 years of age testified that the street (that is the travelled portion of it) adjoining the subject property is located in the same place as it was in 1928.

Kyle Ronald Hiltz the Town Clerk and Treasurer for the Town of Mahone Bay since 1983 was called as the first witness for the Town. He said to the best of his knowledge there are no established official street widths in the Town. He said the Town considers that Main Street is 66' wide as the Town engaged Mr. Eisnor the surveyor to determine its width. He said that the Town first officially became aware of the Appellant's plan for the subject site when an application for a building permit was received in the early part of 1986. He identified Exhibit M-34 as containing copies of correspondence and documents in the Town's files regarding the Appellant's application. After the receipt of the Eisnor survey plan the Town Council examined the plan of survey and considered that it was a correct survey and that the street adjoining the subject site was 66' wide. The Town then instructed Mr. Hiltz to write to the Development Officer, Mr. MacDonald, requesting him to revoke the development permit that had been issued by him to Nor-Jak Investments.

The second witness called by the Town was Gerald Eisnor who was licensed as a Nova Scotia Land Surveyor in 1981. At the request of the Town he conducted a survey of the subject property in 1986. He outlined the procedure he followed in doing his survey which included research in the Registry of Deeds and perusal of a Provincial Statute being Chapter 61 of the Acts of Nova Scotia, 1851 entitled "Of Laying Out Certain Great Roads".

Counsel for the Town tendered, with the consent of Counsel for the Appellant, an Exhibit (M-40) being the original of an Affidavit sworn to on June 19, 1986, which had been prepared in connection with proceedings in the Trial Division of the Supreme Court of Nova Scotia (1986 SBW No. 1191) in the matter of Nor-Jak Investments Ltd. as Applicant and the Town of Mahone Bay as Respondent. According to Counsel for the Town this Affidavit was not actually used in the Supreme Court proceedings. It was tendered as an Exhibit at the hearing before the Board because it sums up Mr. Eisnor's evidence. Mr. Eisnor identified Exhibit M-40 as his Affidavit and re-iterated the truth of the statements made in it.

Mr. Eisnor was referred to a copy of his plan of survey dated June 18, 1986 marked Exhibit 1 to his Affidavit and stated that his plan showed 66' as the width of Church Street at the location of the Appellant's property.

His Affidavit states:

1. That he was engaged by the Town to conduct a survey of a portion of Public Highway Route No. 3 owned by the Town of Mahone Bay in the area of the Starvin' Marvin's store.

2. That Highway No. 3 is known in the subject area as Main Street and as Edgewater Street.

3. That he has examined the plan dated March 7, 1986, prepared by Lester Berrigan.

4. That on his plan he has shown the parking spaces.

5. That the Berrigan plan incorrectly shows the public highway width to be something less than 66'.

6. That it is his opinion "that much of the

proposed parking area along with a portion of the proposed addition, actually lies within the right-of-way for Public Highway No. 3 and hence on land of the Town of Mahone Bay".

7. That he has based his survey of the width of Public Highway Route No. 3 within the Town on Chapter 61, Statutes of Nova Scotia, 1851, entitled "Of Laying Out Certain Great Roads".

8. That he believes that Public Highway Route No. 3 is one of the roads listed in Section 1 of Chapter 61, S.N.S. 1851 "and as such is covered by Section 7 which states that these roads shall be at least sixty-six feet (66') in width".

9. That survey work done in 1954 by the Department of Highways on Public Highway Route No. 3 at the entrance of the Town of Mahone Bay shows Public Highway Route No. 3 as being Sixty-six feet (66') in width entering the Town.

10. That he has examined a plan of survey dated June 8, 1984 prepared by Lester Berrigan showing the Anglican Church property on Public Highway No. 3, 340' northeast of the Starvin' Marvin property which shows the

Highway to be sixty-six feet (66') in width and this plan agrees with his survey of the subject site "insofar as the width of the Public Highway Route No. 3 is concerned".

Mr. Eisnor was asked what reliance did he place on the 1928 plan of survey prepared by March. He replied that he didn't doubt the validity of the work done by March but he concluded that the March plan does not accurately show the location of the street as the street line abutting the subject site is shown as the "approximate street line" by means of a broken line.

On cross-examination Mr. Eisnor stated that for purposes of locating the street boundary in relation to the subject property he ignored any survey markers which he found and determined the street boundary by measuring 33' from the centre of the highway. He relied on the "Great Roads Act" in assuming that the street is 66' wide.

Counsel for the Town recalled Mr. Hiltz, the Town Clerk, for the purpose of establishing the status of the Town's roads. Mr. Hiltz testified that Mahone Bay became an incorporated Town on March 31, 1919. He said that ownership of roads in the Town is vested in the Town by virtue of the Town's Act. The Town maintains all roads in the Town limits but some roads are cost shared with the Department of Highways.

Geoffrey MacDonald, the former Development Officer for the Town was the next witness called. He is presently employed by the Lunenburg District Planning Commission as a planner. He holds a B.Sc. from Kings College. He also completed the Bachelor of Design and Environmental Planning Program at the Nova Scotia College of Art. He has been employed by the Lunenburg District Planning Commission since 1981.

Mr. MacDonald testified that he had issued a development permit in the name of Nor-Jak Investments Ltd. and at the time of the issue of the permit he had relied on the survey plan prepared by Mr. Berrigan. At that time he had some reservations about issuing the permit because of the proposal for parking in front of the building and the necessity of backing out into the traffic on the street. He issued the permit however as he felt the application came within the terms of the Land-Use By-law. He said he was obliged to issue a development permit to Nor-Jak Investments Ltd. because the application satisfied the provisions of the Land-Use By-law notwithstanding the fact that the Town had passed a 1967 By-law restricting development along the waterfront. He said he advised Mr. Hiltz the Town Clerk that if Council wished to enforce the provisions of the 1967 By-law the Town should make provisions for enforcement in its M.P.S. and Land-Use By-law. He referred to the Town's request to him to revoke the development permit issued to Nor-Jak. He said that there was no specific authority in the Town's Land-Use By-law authorizing him to revoke a development permit but where information is brought to his attention which makes it uncertain as to whether a permit should have been issued he believes the proper course of action for him is to revoke the permit. He indicated that he had obtained legal advice from the Town's solicitor that in this situation he did have the authority to revoke a permit. He then revoked the Nor-Jak permit.

Mr. MacDonald referred to the fact that the Town endeavoured to have its M.P.S. and Land-Use By-law amended "to prevent the construction of buildings between Keddy's bridge and the eastern boundary of the lot which originally contained the Starvin' Marvin's convenience store". He said this amendment if approved would not have affected the existing store or any construction on the lot on which the store is located but would have prohibited construction on the other two lots in question. He said that the amendment to the Town's M.P.S. and Land-Use By-law was not approved by The Minister of Municipal Affairs and although passed by the Town Council never came into force and effect. A copy of a letter dated April 8, 1987, from The Minister of Municipal Affairs to the Mayor of the Town is included in Exhibit M-42. This letter refers to the amendments to the Town's M.P.S. and Land-Use By-law passed by the Town on Setember 9, 1986. The letter states in part that:

> "My staff have carefully examined these amendments and have concluded that building development has been prohibited rather than limited and that the Planning Act does not provide for a prohibition of development. Section 51(2) of the Planning Act provides that a Land Use By-law shall only be adopted or amended to carry out the intent of the policies in the Municipal Planning Strategy. The only type of uses permitted in the area by these Land Use By-law amendments are open space types of uses and parking lots but a

> parking lot does not seem to achieve the objective of protecting the unique visual character of the area. There are also other provisions in Section 74 and 75 of the Planning Act which permit parkland designation under certain conditions and these conditions have not been met. It is therefore with regret that I am refusing to approve these amendments as adopted. These amendments are attempting to prohibit development of privately owned lands to preserve a park type of quality for this area of Mahone Bay without conforming to the spirit and the legal requirements of the Planning Act."

On cross-examination, Mr. MacDonald stated that to the best of his knowledge the Town does not have "comprehensive plans or legislation which establishes street widths" in the Town. With respect to the issue of a development permit to Nor-Jak he said that he "had no prior knowledge of any street widths in the Town of Mahone Bay at that point and I had a survey plan which showed the boundaries of the property and the development fitted within those boundaries and satisfied the other requirements of the By-law as best as I could determine so issued a permit". He said it was some months after he issued the permit that he became aware that there was an issue as to the location of the boundaries of the subject property.

On cross-examination Mr. MacDonald admitted that he was in error in not raising the matter of the 12' x 40' loading space requirement in connection with the Nor-Jak permit application. He said the Land-Use By-law contains the requirement and it was his error in nor making sure that the requirement was met. He said that if the Berrigan plan is correct, the loading space requirement would be met. Mr. MacDonald indicated that the Appellant would now be entitled to a development permit if the three reasons for refusing the permit set out in Ms. Dempsey's letter of March 3, 1987, were invalid. These reasons relate to (1) set-back requirements (Section 12.2 of the Land-Use By-law), (2) off-street parking requirements (Section 5.26 of the Land-Use By-law) and (3) loading space requirements (Section 5.25 of the Land-Use By-law).

With respect to the Town's 1967 Building By-law No. 15, Mr. MacDonald stated that the Town's Development Officer does not administer this By-law and it would not be considered by the Development Officer on an application for a development permit.

In response to a question from the Board, Mr. MacDonald stated that if he was now the Town's Development Officer he would refuse to issue a development permit to the Appellant for the same three reasons set forth in Ms. Dempsey's letter of March 3, 1987.

Karen Dempsey the Development Officer for the Town since November of 1986 was the next witness called by the solicitors for the Town. She is employed by the Lunenburg County District Planning Commission. She is a graduate of the N.S. College of Art and Design in 1979 with a Bachelor of Design in Environmental Planning. In March of 1987 the application by the Appellant for a development permit came to her attention and she reviewed her file and was aware of the decision of Geoffrey MacDonald in refusing to issue a development permit because of the 120-day freeze provided for in Section 76(7) of the Planning Act and she was also aware of the discrepancies between the two survey plans and because of these discrepancies she concluded that she could not issue a permit. She then wrote to Mr. Wearing on March 3, 1987, explaining why she could not issue a permit. She indicated that it is not her function to choose which of the two survey plans is correct and until this conflict is resolved she is unable to issue a development permit. She is still of the opinion that she properly refused to issue the permit for the reasons set forth in her letter of March 3, 1987. She indicated that if the Eisnor plan was correct then some scaled down development would be permitted on the subject land. If the proposed building were smaller the parking space requirements would be less.

Ms. Dempsey stated that if it could be shown that the Berrigan plan is correct she would issue a development permit. She indicated that she would not determine which of two survey plans was correct. She would leave the resolution of this problem to the parties involved.

On cross-examination Ms. Dempsey was asked what her opinion was as to the street widths in the Town. She said she "wouldn't hazard a guess".

Eileen MacKay, the owner of property known as No. 57 Parish Street in the Town next gave evidence. She has resided at this address since 1978 and has been the owner since 1975. Her property is within 500' of the subject site. She has three concerns, namely:

1) She is opposed to any further development on the water side of Edgewater Street;

2) Parking and traffic near the present Starvin' Marvin's store. She said most cars parking in front of the store back out into the traffic on the street. She says this is a very congested area of the Town. She says if there is more development in this area there will be more parking and more congestion;

3) The parking in front of the Appellant's store makes pedestrian movement difficult.

On cross-examination Ms. MacKay admitted there were parking problems in other parts of the Town but in her opinion these problems were not as severe as in the vicinity of the Appellant's store.

The last witness to testify was Donald D. Croft called by the Appellant. He is a former automobile dealer and is now semi-retired. His automobile business had been located across the street from the subject site and he had operated the business for about 30 years. He has lived in the Mahone Bay area since 1950. He is familiar with the subject site and had rented for five years the two vacant parcels of land (lots 2 and 3) forming part of the subject property for the purposes of storing automobiles. He said when he used the property he had it fenced right to the paved portion of the street. The Town used to dump snow on this land after requesting his permission to do so. His use of the land was for a five year period prior to 1984.

Mr. Croft said he was on Town Council in 1967 when Building By-law No. 15 was amended. Counsel for the Appellant read to the witness the amendment to By-law No. 15 a copy of which is contained in Exhibit M-35. This amendment prohibits building on lands lying between the shores of Mahone Bay and Edgewater Street "from Keddy's Bridge to the western boundary line of the property now or formerly owned by Phillip Eisenhauer...". He said that lot numbers 2 and 3 of the Starvin' Marvin's property "was not included into this By-law" or it was not the intention to include these lots in the By-law because this land was already in use with buildings on it and "we didn't want to expropriate it".

On cross-examination Mr. Croft stated that lots 2 and 3 were owned by Phillip Eisenhauer. Lots 2 and 3 would therefore appear to come within the prohibited building area of the By-law.

At the conclusion of the evidence Counsel for the Town and Counsel for the Appellant presented brief verbal arguments as to their respective positions.

Counsel were directed by the Board to file written memoranda by May 22, 1987, with the privilege to file rebuttal briefs within the following week.

The Board in this case has two options under the provisions of s.s.(3) of Section 78 of the Planning Act, it shall either confirm the decision of the Municipal Development Officer in refusing to issue a development permit or it shall allow the appeal by ordering that the permit be granted "but no permit shall be granted that is inconsistent with the land use by-law, an agreement entered into pursuant to Section 55 or 56, or a provincial land-use regulation". Since there is no agreement entered into or provincial land-use regulation in force, the permit shall not be granted that is inconsistent with the Land-Use By-law of the Town.

Although the Appellant actually filed two Notices of Appeal relating to two decisions made by the Town's Development Officer, the first Notice of Appeal made on October 29, 1986, from the decision of Geoffrey MacDonald dated October 16, 1986, is really a non-issue because the Development Officer's reason for refusing to issue the development permit was based on the statutory prohibition to issue a permit for 120 days that is inconsistent with a proposed amendment to the Town's Land-Use By-law (Section 76(7) of the Planning Act). Counsel for the Appellant acknowledged during the course of the hearing that Geoffrey MacDonald the Development Officer properly refused to issue a permit because of the freeze imposed under Section 76(7) of the Planning Act. The Appellant's first application for a development permit was made on October 9, 1986 and the Council had advertised its intention to amend its Land-Use By-law and M.P.S. on July 18, 1986. The proposed amendments, in the words of Mr. MacDonald set out in his letter of refusal dated October 16, 1986, "would severely restrict new construction in the area between Edgewater Drive and the mean high water mark".

The real issue in this case arises out of the Appellant's second Notice of Appeal (Exhibit M-3) dated March 16, 1987 appealing the decision of Karen Dempsey the Town's Development Officer who succeeded Geoffrey MacDonald in that office, made March 3, 1987, refusing to issue a development permit. Ms. Dempsey's letter of refusal refers to the Appellant's application of October 9, 1986 and Mr. Geoffrey MacDonald's refusal to issue a permit based on Section 76(7) of the Planning Act. Ms. Dempsey gave three reasons for her refusal, viz:

> "1. According to the Gerald Eisnor plan this proposed addition does not meet the setback requirements of Section 12.2 of the Land-Use By-law.
>
> 2. According to the Eisnor plan, your proposed parking is located on the public street, which is in violation of Section 5.26 of the Land-Use By-law, which requires that you supply off-street parking.
>
> 3. Your application of 09, October, 1986 does not show any loading space, and so it does not satisfy Section 5.25 of the Land-Use By-law which requires a 12' x 40' loading space for such commercial buildings."

Ms. Dempsey's letter of refusal states that the Appellant's application of October 9, 1986 contains a sketch "illustrating your application" which "is based upon a survey plan of 07 March, 1986 by Lester Berrigan". Her letter also states that the Town Clerk had supplied her with a survey plan by

Gerald Eisnor and that "a comparison of the two plans reveals a discrepancy over the location of your property boundary along Route 3 (also known as Church Street or Edgewater Street)."

Ms. Dempsey in her testimony before the Board stated that she did not believe it to be her function to choose which of the two survey plans prepared by Lester Berrigan and Gerald Eisnor is correct and she stated that until this conflict is resolved she is unable to issue a permit. Her letter of refusal however suggests that she has apparently chosen the Eisnor plan of survey as her finding that the application does not meet the setback requirements of Section 12.2 of the Land-Use By-law is based on the accuracy of the Eisnor plan. Similarly her finding that the Appellant's proposed parking is located on the public street and is therefore in violation of Section 5.26 of the Land-Use By-law is based on the Eisnor plan of survey.

Counsel for both the Appellant and the Town were in agreement that, if the Berrigan plan of survey were correct the Appellant would be entitled to have a development permit issued. They were also in agreement that this Board does not have the power or authority to determine which of the two survey plans is correct as that is a matter for resolution by a Court of Law. If Counsel are correct on this point it leaves the Board in a bit of a dilemma as far as determining the issue of whether the development permit applied for is "inconsistent with the land-use by law" pursuant to s.s. (3) of Section 78 of the Planning Act.

Under the provisions of s.s. (2) of Section 76 of the

Planning Act the Development Officer in this case is obliged to issue a development permit "for a proposed development if the development conforms to the land-use by-law...". It is interesting to note that under s.s. (3) of Section 76 of the Planning Act, "a municipal development permit shall not be refused by reason only that it conflicts with a planning strategy."

A great deal of the evidence at the hearing related to the question of how wide is Church Street (also known as Edgewater Drive) where it abuts the Appellant's lands. In this regard the evidence of Mr. Eisnor is that the street is 66' wide based on the pre-Confederation Statute of Nova Scotia entitled "Of Laying Out Certain Great Roads" S.N.S. 1851, c. 61. On the other hand, the evidence of Mr. Berrigan based on the 1928 plan of survey of the subject property by S.E. March is that the street is only 38' wide at a point opposite the eastern portion of the subject property.

In his Post-hearing submission Counsel for the Appellant comments on two issues viz:

> "1. Is the statute Of the Laying Out Certain Great Roads c. 61 Statute of Nova Scotia 1851 (referred to hereafter as the Great Roads Act) applicable to the present case.
>
> 2. Did the Development Officer err in law in not issuing a development permit on the grounds of non compliance with s. 5.25 of the Land-Use By-Law."

With respect to the first issue he submits that the "Great Roads Act" is not applicable for two reasons:

> "(a) The Act has been repealed.
>
> (b) The imposition of the 66' standard is discriminatory."

Counsel for the Appellant admits in his brief that "the Great Roads Act is not expressly repealed". He argues that it was repealed by implication. He submits that highways in Nova Scotia get their statutory "being" from the Public Highways Act, R.S.N.S., 1967, Chapter 248, which states that:

> "This Act applies to all highways within the Province not included within the boundaries of a City or Town, and does not, except where expressly provided, apply to highways within the boundaries of cities or towns".

He also refers to Section 14 of this statute which states that:

> "Every common and public highway shall until the contrary is shown, be deemed to be at least 20.1168 meters in width."

20.1168 meters equates to 65.999867 feet.

The Town was incorporated on March 31, 1919 as appears in a foot note on Page 1 of the Town's "First Revised Municipal Planning Strategy" (Exhibit M-33). The Public Highways Act S.N.S. 1917, c.3 was passed on May 9, 1917. It was amended in 1919 by S.N.S. 1919, c.64 and passed on May 17, 1919.

This amendment of 1919 added Section 40 to the Public Highways Act. S.S.(2) of Section 40 states that:

> "Every public road now open or used as such, shall be deemed to be a common and public highway vested in the Crown."

The 1919 amendment also added Section 41 which reads in part as follows:

> "Every common and public highway shall, until

> the contrary be shown, be deemed to be at least sixty-six feet in width.----".

On the assumption that the Public Highways Act does not apply to highways or roads in a town one then must look at the Towns Act, R.S.N.S. 1967, c.309, for guidance. Section 145 of this act provides that:

> "all public streets, roads, lanes.....are hereby vested absolutely in the town and insofar as is consistent with their use by the public the Council shall have full control over the same".

The Towns Act states in Section 166(1) that:

> "The town council, except in this Act otherwise provided, shall not lay out, open or construct nor accept the dedication of any street which is less than fifty feet in width".

" Section 167 of the Towns Act provides that:

> "The town council may lay out, open or accept the dedication of any street already opened up and built upon by private parties and its use by the inhabitants of the Town, where in its opinion great damage would be done to adjoining property by taking the full width of fifty feet".

Counsel for the Appellant after making reference to a number of sections in both the Public Highway Act and the Towns Act states that:

> "These sections have been laid out in detail to make a point and that is that clearly by implication the Great Roads Act of 1851 has been surpassed by more cogent and detailed legislation. It cannot control roads either inside or outside of the Town of Mahone Bay as the legislature has seen fit to specifically vest these in either the Province or the Town.
>
> Interestingly enough both recognize exceptions to the statutory width established by these laws and it would only be proper

> given the way the communities grew up on these roadways. Neither statute is so inflexible as to impose a 66 foot width regardless of the inhabitants and each allows a mechanism to mediate disputes. But the major point is that there is no room for the Great Roads Act of 1851 and its inflexible provisions as sought to be imposed by the Town in this case.
>
> The Town, by its own admission, has not established a set street width (refer to the evidence of Kyle Hiltz, Town Clerk of Mahone Bay). But in this case the Town ignores the applicable statutes, its own admission of no recognizable street width, and ressurects the Great Roads Act to substantiate its claim."

With respect to the second issue raised by Counsel for the Appellant in his Post Hearing brief as to whether the Development Officer erred in not issuing a development permit on the grounds of non-compliance with s.5.25 of the Land-Use By-law, the Appellant submits that "technically the officer should have complied with s.77(4) of the Planning Act and within 15 days of receipt of the application, advised the Applicant of its incompleteness. "The Appellant argues that to now deny a permit due to incompleteness would be unfair on two basis.

> "(a) ...the former development officer issued a permit to Nor-Jak Investments Ltd. without consideration of s.5.25 of the Land-Use By-law (which requires a 12' x 49' loading space"), and
>
> "(b) ...the evidence at the hearing shows that the Applicant has enough room to comply in any event. Had he known of this requirement he could have complied. Originally even the first development officer thought he had."

Counsel for the Town filed a Post Hearing Brief on May 27, 1987. At page 6 he states that "it appears to be common ground that if the Berrigan Survey Plan is correct, then a

Development Permit should be issued whereas if the Eisnor Survey Plan is correct, then it should not. The issue then becomes was the Development Officer correct when she refused to issue the Development Permit in the face of two conflicting Survey Plans".

Counsel for the Town refers to the provisions in Section 16.3(b) of Part 16 of the Town's Land-Use By-law which states that:

> "Where the Development Officer is unable to determine whether the proposed development conforms to this By-law and other by-laws and regulations in force which affect the proposed development, he may require that the plans submitted under Subsection 1 be based upon an actual survey by a Provincial Land Surveyor."

He then submits "that in the face of two conflicting Survey Plans, both prepared by licensed Nova Scotia land surveyors, it was impossible for the Development Officer in this instance to satisfy herself that the requirements had been met. In that situation she would have no alternative but to refuse to issue the Development Permit." He argues that the Development Officer must be satisfied that the requirements of the Land-Use By-law have been met before issuing a permit and "the onus for doing that rests on the Appellant". He suggests that the Appellant as an Applicant for a permit "could have the question of what land it owns resolved by the Supreme Court and at the conclusion could reapply for a Development Permit."

Counsel for the Town submits at page 10 of his Post Hearing Brief that "neither the Development Officer nor the Municipal Board has the jurisdiction to decide legal boundaries either directly or by implication. The surveyor, in his Plan, expresses only his opinion as to the legal boundary. In a dispute, the jurisdiction to decide legal boundaries, rest solely with the Supreme Court by virtue of the Judicature Act, S.N.S. 1973, c.2. Only after the Court rules on the issue can one be sure as to where the legal boundary is located."

The Town's Brief states at page 11 that "the Town became involved as the owner of the street because the proposed development was based upon information it thought was incorrect and which involved a proposed development using part of its property in connection with its development".

Counsel for the Town in his brief indicates that the basis of the Town's case for a sixty-six (66) foot wide street, as set out in the Eisnor Plan is the statute entitled "Of Laying Out Certain Great Roads" S.N.S. 1851, c.61 and in particular Section 7 which provides that Sixty-six (66') feet is the width of the great roads. His brief at page 12 states that:

> "Section 2 of that Statute describes the great roads, and within that description, the road is described as going from Bridgewater to Mahone Bay and then to Chester. The evidence is that there is and has been only one road through Mahone Bay from Bridgewater to Chester. At the time of the Statute, 1851, Mahone Bay was unincorporated so there would be no basis to an argument that the great road stopped and then commenced on the boundaries of the Town. At that time there was no Town so therefore there were no Town boundaries. The simple reading of that section is that the road went through the area then known as Mahone Bay. Also as a Provincial Statute, it would still be in effect unless expressly repealed by the Legislature."

Counsel for the Town in his brief submits "that the only issue to be decided here by the Municipal Board is whether the Development Officer under the circumstances and with the information she had before her, acted reasonably in the exercise of her discretion in finding that she was not satisfied that all the requirements of the Land-Use By-law had been met. It is further submitted that the Municipal Board should find that she did act reasonably under the circumstances and deny the appeal. To do otherwise would place the Board in the position of deciding matters of title and boundaries which are within the jurisdiction of the Supreme Court".

Counsel for the Appellant filed a Rebuttal Brief on June 3, 1987, in which he disagrees with the Town's contention that jurisdiction to settle boundary disputes rests solely with the Supreme Court. He refers to s.14 of the Public Highways Act and s.145, s.166 and s.167 of the Towns Act which "provide alternative mechanisms to settle boundary disputes".

The Appellant's rebuttal brief states that Town By-law No. 15 "would of course be subject to s.112(1) of the Planning Act which states:

> "112(1) A zoning by-law or an official town plan passed under any former Town Planning Act, which by-law or plan was in force immediately before the coming into force of this Act, shall continue to be in force for a period of thirty months after the coming into force of this Act and for such further period as the Minister may, by order, determine with respect to the by-law or plan, unless sooner repealed, and they are and are deemed to be repealed upon the coming into force of a municipal planning strategy and land-use by-law."

The Board disagrees with Counsel for the Appellant that Town By-law No.15 is subject to s.112(1) of the Planning Act as s.112(1) relates only to a zoning by-law or an official Town plan passed under any former Town Planning Act. By-law No.15 is a building by-law and is neither a zoning by-law or an official Town plan.

Counsel for the Appellant concludes his Rebuttal Brief by suggesting that the Town pressured the Development Officer to reverse his decision by relying on "statutes and laws no longer applicable" and by the Town "marshalling its resources to find an excuse to deny the Appellant his opportunity to build".

The subject site is located in a very prominent portion of the Town. It is in close proximity to the Town monument which lies at the intersection of Church Street (Edgewater Drive) and Main Street. Provincial Highway Route 3 or its continuation in the Town of Mahone Bay passes by the subject site. Provincial Highway Route 3A leading from Mahone Bay to Bridgewater joins Highway Route 3 near the Town monument. The subject site has for its rear or southeastern boundary the waters of Mahone Bay.

The introduction section 1 of the Town's M.P.S. states in paragraph one that:

> "The Town of Mahone Bay is situated at the head of Mahone Harbour and is one of two coastal Towns in Lunenburg County. The principal settlement is orientated toward the water in a small, scenic cluster of residential, commercial and institutional land use".

Paragraph four of the introduction to the M.P.S. states that:

> "Mahone Bay's challenge for the 1980's is to foster new development related to the tourist industry and to move toward diversity and quality in the service sector to maintain its

> share of the regional market. The Town must maintain its present level of services and the quality of its living environment in order to halt its declining population. These objectives will be realized only through good planning and positive promotion of the Town as a business and residential community."

The M.P.S. at page 2 states in part that:

> "The Town of Mahone Bay is a scenic community of modest size and population. In addition to serving as a small service centre, the Town has undergone an evolution in emphasis away from light industry that was focussed upon boatbuilding, toward tourism, particularly fine arts and crafts".

In driving through the Town one is greatly impressed by the beauty of the Town with its many fine Church buildings and with the waters of Mahone Bay. The M.P.S. is accurate in describing the Town as a "scenic community" which undoubtedly is helpful in the promotion of the tourist trade.

It is therefore understandable that the Town Council in 1967 amended its Building By-law No.15 by prohibiting buildings from being erected on certain lands lying between the shore of Mahone Bay and Edgewater Street in an effort to preserve the scenic beauty and character of the Town. It is also understandable why the Minister of Municipal Affairs in 1986 refused to approve the Town's endeavour to have the 1967 prohibition incorporated into the Town's M.P.S. on the basis that the Planning Act provides for limiting development but not for prohibiting it.

While it is undoubtedly the sole duty and responsibility of the Town's Development Officer, after receiving an application for a development permit, to either issue or refuse to issue the permit within thirty days of the receipt of the application (Section 77(5) of the Planning Act), it is nevertheless within the authority of the Council to investigate the details of any application and make representations to the Development Officer. This is what actually happened in this case. The Town engaged Mr. Eisnor, the surveyor, to check and determine the width of the street in the vicinity of the subject site. Mr. Eisnor determined that the width of Church Street is sixty-six feet (66') and he prepared a plan of survey of the subject property dated June 18, 1986, based on a street width of 66'. His plan was given to the Town and on June 19, 1986, Mr. MacDonald who at that time was the Development Officer, revoked the permit he had issued to Nor-Jak because of his understanding that the street was 66' wide and the subject property boundary line was 33' from the center of the street.

The Appellant's application for a development permit made on October 10, 1986, was processed by Karen Dempsey who became the Town's Development Officer in November of 1986. Her letter refusing the application is dated March 3, 1987 and her three reasons for the refusal are set out in her letter. The first two of these reasons relate to the application not meeting the requirements of Sections 11.2 and 5.26 of the Land-Use By-law "according to the Eisnor Plan". She thus appears to accept the Eisnor plan as being correct although in her evidence before the Board she was unwilling to give her opinion as to which of the two plans was correct. Her letter of March 3, 1987 does indicate that "a comparison of the two plans reveals a discrepancy over the location of" the property boundary along Church Street. She did not point out in her letter of March 3, 1987, that if the Berrigan plan is correct the application would meet the requirements of Section 12.1 and 5.26 of the Land-Use By-law.

It is my opinion that the Development Officer may only issue a development permit if she is satisfied that the application is consistent with the provisions of the Town's Land-Use By-law. Karen Dempsey the Development Officer who made the decision refusing the application did so on the basis that the application does not meet some of the requirements of the Land-Use By-law. In order to make this decision she had to actually determine that the Eisnor plan is correct. In my view the Development Officer, in making a determination as to whether an application is consistent with a Land-Use By-law in a case where there is a discrepancy between two plans, may refuse to issue the permit because of the uncertainties involved or choose one of the two plans she believes to be correct and then either issue the permit or refuse to do so based on whether the application is consistent or inconsistent with the Land-Use By-law.

It is my opinion that Karen Dempsey the Development Officer, made the correct decision in refusing to issue a development permit to the Appellant. On the assumption that the Eisnor plan is correct, she properly concluded that the permit would not be consistent with the Land-Use By-law by virtue of the fact that the Appellant's lands were not large enough to satisfy the set-back requirements of Section 12.1 of the Land-Use By-law and were not large enough to provide the required off-street parking requirements of Section 5.26. Counsel for both parties were in agreement that if the Eisnor plan is correct the permit should not be issued. Counsel for both parties were in agreement that it is not within the Board's jurisdiction to determine which of two plans is correct. I do not agree with Counsel on this point. If, to determine whether a proposed permit is consistent with the Land-Use By-law, it is necessary to choose between two plans then I am of the opinion that the Board may make such a choice. The decision of the Board may be reviewed in a proper case on a question of jurisdiction or on a question of law pursuant to the application for leave to appeal provisions of Section 35(1) of the Municipal Board Act, S.N.S. 1981, c.9.

It is my further opinion that a development officer faced with the dilemma experienced by Karen Dempsey in this case may reasonably and properly refuse to issue a development permit in circumstances where she is confronted with two competing plans of survey and is unable to determine which one is correct.

Although both Mr. Berrigan and Mr. Eisnor are qualified and experienced land surveyors, I am inclined to the opinion that Mr. Eisnor's plan is correct based on his determination that Church Street is in fact sixty-six feet (66') wide. Certainly at the time of the enactment of the statute entitled "Of Laying Out Certain Great Roads" S.N.S. 1851, c.61 the road described in the statute as "the road from Liverpool to Mills Village, thence to Bridgewater and Mahone Bay, and thence to Chester and Windsor" includes that portion of Church Street (also known as Edgewater Street and being a portion of Provincial Highway No. 3) adjacent to the subject site. Under Section 7 of that statute this road was "at least sixty-six feet in width". Therefore since 1851 Church Street had a width of at least 66'.

If as I believe to be the case Church Street was part of a "Great Road" in 1851 its width would be governed by the statute entitled "Of Laying Out Roads other than Certain Great Roads" being Chapter 62 of the Acts of Nova Scotia, 1851. Section 1 of this Act states that the Act applies to "roads other than those mentioned in the last chapter" that is Chapter 61, of the Statutes of 1851. Section 10 of Chapter 62 S.N.S. 1851 states that "The roads hereinbefore referred to shall be laid out at least sixty-six feet in width."

Even if I am wrong in law in my opinion that both the Development Officer and the Board have the authority to choose one of two survey plans as being correct and then make a determination as to whether the permit is consistent with the Land-Use By-law, it is my opinion that Karen Dempsey made the correct decision in this case by refusing to issue the permit. If she couldn't choose between the two plans she is therefore justified in refusing to issue the permit on the basis of the doubt created by the plan discrepancy because she would not then be satisfied that the permit was consistent with the Land-Use By-law.

I have reviewed all of the grounds of appeal set out in the Appellant's Notices of Appeal and I hereby reject them on the basis of their invalidity. There is an onus on the Appellant of clearly demonstrating to the Board that the decision of the

Development Officer under appeal were wrong and that the Appellant is entitled to a development permit because the permit applied for was consistent with the Town's Land-Use By-law. The Appellant in my opinion has failed to discharge this onus.

In the result the Board, pursuant to Section 78(3)(a) of the Planning Act, confirms the decisions of the Development Officer in refusing to issue a development permit to the Appellant.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 23rd day of July, A.D., 1987.

Robert HN Blois

ROBERT H.N. BLOIS, authorized to
exercise the jurisdiction of a
member of the Nova Scotia Municipal
Board under Order-in-Council
No. 87-759 made June 23, 1987
pursuant to Section 4 of Chapter 9
of the Municipal Board Act
S.N.S. 1981 c.9.

Benham v. Town of Lockeport

PLANNING--ZONING AMENDMENT--REZONING FROM R1 TO M1--WHETHER AGGRIEVED PERSON--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--WHETHER CONSTITUTIONAL PROBLEM OVER HARBOUR FORESHORE LANDS--MUNICIPAL BOARD ACT, SS. 16(1), 29, 32(2)--PLANNING ACT, SS. 38(4), 39(4), 50(1),(2), 60(3), 63(1),(2),(3),(4),(5),(8), 64, 71--TOWN OF LOCKEPORT MPS, SECTIONS 1.1, 1.2, 1.3, 1.5 2.1, 2.2, 2.3.1, 2.3.2, 2.3.3, 3.1, 3.2.6, 3.3.1, 3.5, 3.6, 3.7.1, 3.8.1, 4.3, 4.5, 4.6, 4.7, GENERAL POLICIES 8, 13, RESIDENTIAL POLICIES 1, 2, 4, 5, 13, 16, COMMERCIAL POLICY 16, INDUSTRIAL POLICIES 1, 2, 3, 4, 5, 6, 7, 8, MUNICIPAL SERVICES POLICY 1, TRANSPORTATION POLICIES 4, 7, 9, TOURISM POLICY 5, IMPLEMENTATION POLICIES 2, 8, 10, 11, 12, APPENDICES A, C

This is an appeal by L.B. as an aggrieved person from a decision of the Council of the Town of Lockeport rezoning property on the south side of South Street from Residential General (R1) to Industrial General (M1). The Town objected to the status of the Appellant as an aggrieved person. The Board heard evidence on this issue as well as on the planning merits. The Appellant owns several pieces of property in the Town. The applicant for the rezoning, F. Pierce Trucking Ltd., has an agreement for the resale of the subject property from new owners back to itself, conditional upon the rezoning, and intends to use the site to operate a trucking business to ship fresh fish to the United States. The subject property is within the Town's Municipal Planning Strategy (MPS).

HELD: The appeal is allowed and Council is instructed to amend its Land-Use By-law.

The Appellant is an aggrieved person. Her home property is separated from the subject property by 1/2 the width of the Town and so the rezoning would not cause her injury by lowering the value of her home property. L.B.'s mother has a life estate in land very close to the subject lands, but this would cause no injury to the Appellant. L.B. has a vacant lot in close proximity but on her own evidence the rezoning will not affect the value of it. She does, though, have a residential rental property on the shore of the harbour in close proximity to the subject lands that has likely been diminished in value by the rezoning. It is unnecessary in this appeal to determine the effect if any of the B.C. Ombudsman case (1984, S.C.C.) on the definition of "aggrieved person".

The Board must determine whether the decision of Council reasonably carries out the intent of the MPS (see s.63(3) of the Planning Act). The Board should first proceed to determine the intent of the MPS and then test the decision of Council (not the proposal) against that intent. In order to determine the intent of the MPS as to whether the subject lands can be zoned and designated industrial, the Board has the right and duty to make inquiries into who has legislative jurisdiction over the harbour foreshore. The Appellant has not met the burden on her of proving to a balance of probabilities that the subject lands, which are daily covered from time to time with tidal water, are property of the federal government by virtue of being used as a public harbour at the time of Confederation. There is no indication the federal government has acted to plan land use on the foreshore of Lockeport Harbour. The land is part of the Province of Nova Scotia and is capable of being zoned and designated by the Town under the Planning Act. The main objection of the Appellant to the rezoning is the worst possible use to which M1 lands may be put in a residential area. The Appellant also argued the MPS intended no additional industrial uses be permitted south of South Street and that the land rezoned has uncertain and indefinite boundaries, however, the Board is not persuaded on these latter points. As to the worst case scenario, the Board is satisfied that the applicant intends to build what it has proposed and that what is proposed would not be an unwarranted intrusion into the surrounding residential neighbourhood. The MPS intends industrial development and this is an imperative for Lockeport. The *intent* of Council's decision does carry out the intent of the MPS, but the *text* of the decision as documented in evidence does not. The diagrams used in the pre-hearing and post-decision advertising encompass land other than that of the applicant and an indefinite amount of land was yielded to aid the title of an encroacher. The MPS also permits only a one lot "tier" of M1 zonal expansion from the industrially designated base. The necessary precision can be achieved by reference to the 40,215 sq. ft. area of Pierce Fisheries Ltd. lands included on a plan exhibited to the Board. The Board instructs Council to amend the By-law to remedy these problems.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF : The Planning Act , S.N.S., 1983 , Chapter 9 ;

- and -

IN THE MATTER OF : An appeal by **LILLIAN BENHAM** of Lockeport from the decision of the Town Council of the **TOWN OF LOCKEPORT** made on November 13th , 1986 to amend Schedule A of its Land Use By-Law by redesignating the property currently owned by Pierce Fisheries (sic) on the south side of South Street from Residential General (R1) to Industrial General (M1).

BEFORE : RICHARD L. WELDON , Member

COUNSEL: ERIC C. LEDREW LL.B. , on behalf of the Appellant , LILLIAN BENHAM;
RAYMOND LARKIN LL.B and KIMBERLY TURNER LL.B on behalf of the TOWN of LOCKEPORT;
S. CLIFFORD HOOD Q.C.on behalf of F. PIERCE TRUCKING LIMITED , Applicant to the Town

DECISION

Pursuant to Section 16 (1) of **CHAPTER 9 , S.N.S. 1981** , **THE MUNICIPAL BOARD ACT ,** The Chairman assigned Board member Richard L. Weldon to hear this planning appeal at the Board's March 30 , 1987 sittings at the Council Chambers of the Town of Lockeport. [The Town of Lockeport will hereinafter be referred to as the Town]

A letter serving as an indication of intention to appeal , dated December 4th , 1986 , was served on the Board by prepaid ordinary mail by the Appellant Lillian Benham December 8th , 1986. The Board assigned the Chairman to peruse this letter serving as an indication of intention to appeal . The Chairman decided this letter did not fully comply with the Planning Act and the Rules made thereunder as to the form and content of an appropriate Notice of Appeal . By letter to the Appellant of December 8 , 1986 the Chairman gave the Appellant an opportunity to amend the " Notice of Appeal " within 14 days from December 8 , 1986 , extended for the same time the right of the Appellant to fulfill her duty to file a written undertaking to pay for the advertising costs for advertising the Notice of Hearing . In the same letter , He requested the Appellant to state in her "amended Notice of Appeal" the date of the advertisement of the decision of Council complained of .

By a document entitled "Notice of Appeal"(not "Amended Notice of Appeal" as instructed by the Chairman) dated the 15th of December , 1986 and received by the Board on December 17th , 1986 the Appellant responded to the Chairman's letter of December 8 , 1986 and cited as the basis of her appeal S. 71 of the Planning Act S.N.S. 1983 C. 9 . At the same time by a separate document , the Appellant undertook to pay the costs of advertising the Notice of Hearing.

The Appeal seeks to have the Board reverse the decision of the Town Council (hereinafter referred to as the Council) of the Town made on November 13th , 1986 to amend Schedule A of the Lockeport Land Use By-Law (such by-lawswill hereinafter be called LUB) by rezoning property currently owned by Pierce Fisheries (sic) on the south side of South Street from Residential General (R1) to Industrial General (M1).

The appeal came on for hearing at 10.00 A.M. on March 30 , 1987 at Council Chambers , Lockeport , pursuant to the Notice of Hearing dated the 25th day of February A.D.1987. The Board heard evidence followed by verbal argument over a three day period and took a conducted view of the site during a noon adjournment of the hearings . Unaccompanied , the Board by motor vehicle took a view of all the streets of the Town located on the main island (Locke's Island) portion of the Town.

The procedural matters as to the service and filing and amendment to the Notice of Appeal , the notification to all appropriate persons of the commencement of the appeal , and the service and advertisement of the Notice of Hearing were proven to the satisfaction of the Board as well as to the satisfaction of all parties represented at the hearing.

Objection was taken by the Town as to the status of the Appellant as an aggrieved person within the meaning of the Planning Act . In the interests of prompt settlement of the appeal , the Board decided to hear all the available evidence and argument on this issue along with all the evidence and argument concerning the planning merits in one hearing. At the conclusion of verbal argument , the parties were permitted to submit and exchange further written argument not latter than April 27 , 1987. The last of these post hearing submissions was received by the Board on April

24 , 1987. In his argument , Mr. Ledrew wished the Board to " judicially " note a fedreral order-in-council (OIC). (He had not brought a text of the OIC to the evidentiary portion of the hearing and he had not at the evidentiary portion of the hearing attempted to prove the text of the OIC.) On May 12 , 1987 the Board wrote to Mr. Ledrew and said , in part ,

> " Is the enclosed photocopy of an Order-in-Council the one you wish to be so noticed ?
> If so , what relevance to this hearing is the bare declaration that ' the Port of Lockeport ... be duly proclaimed as a Port ...?'
> Do you have a statutory citation supporting this Order-in-Council with a statutory history which might make this Order-in-Council both 'au courrant and germane to the issues before the Board?"

Copies of this letter went out to the counsel of all parties who had appeared before the Board.

. By letter dated May 15 , 1987 , Mr. Ledrew stated " ... I will attempt to answer the questions in your letter as soon as possible." Mr Hood replied on May 19th , 1986 : ... " The document ... does not in my view have any relevance to the proceedings.... "

Mr. Larkin , also by letter of May 19th , 1986 , says this :

> "We have reviewed the ...Order-in-Council...and agree the relevance of this historical document to the issues before...Board in this appeal is questionable. ...
> this does not ... declare Lockeport Harbour to be a Federal harbour under the jurisdiction of the Parliament of Canada.
> ... even if Lockeport is a Federal harbour ... the Town's jurisdiction to zone the area in question is answered by ...[the decision in] Hamilton Habours Commissioners ... In any case where there is an overlapping or concurrent jurisdiction between the Province and the Federal Government , both legislative bodies may exercise their jurisdictiion

so long as no conflict exists. If a conflict occurs , the Federal power will prevail... ."

By letter of June 3rd , 1987 Mr. Ledrew made his substantial reply to the Board's letter of May 12 , 1987 :

> " I have had an opportunity to research the question of jurisdiction in more depth. ...
>
> As a result of my research , it seems that to establish that a harbour is a public harbour and therefore was conveyed to the Federal Government in 1867 , the harbour had to be used by the public before Confederation. This , of course , would require calling evidence.
>
> Alternatively , Lockeport Harbour may have been declared a public harbour , as indeed I was led to believe. However , the copy of the proclamation which you have sent me does not explicitly do so. [Board's note: Please look at text of Board's letter to show the context in which the the copy of the OIC was sent to counsel herein]
>
> Even if Lockeport Harbour is under Federal jurisdiction the extent of that jurisdiction must always be established , especially concerning the foreshore , by usage. Again evidence would have to be called ... to establish the extent of Lockeport Harbour.
>
> If all these hurdles were crossed , then the town's representations regarding the concurrent jurisdiction would have to be met. I have been instructed by Mrs. Benham to indicate to the Board that even if the Board was willing to consider re-opening the case to permit evidence to be called regarding the establishment of Lockeport harbour as a federal harbour , Mrs. Benham is not in a position to pursue that course of action. Accordingly Mrs. Benham requests the Board to determine the issue on its merits."

By letter of June 12 , 1987 the Board expressed its understanding of the position of the Appellant as it then stood:

> "...your letter of June 3...first came to my attention on June 11... . I have read this letter carefully on more than one occasion and I have come to the following conclusion [sic] :
>
> 1. That you intend to make no further argument on any of the issues before the Board ;
>
> 2. That you are instructed not to ask for any additional evidence to be called before the Board or for the hearing to be reopened ;

3. You have not been required by your client to withdraw the appeal.

If I am incorrect in any of those submissions please let me know by return mail.

Unlike the Assessment Act , there appears to be no duty under either the Municipal Board Act or the Plannning Act to ensure that the Board make a full inquiry of the matters before it [or under those statutes combined].

Assuming I am correct in that position , I shall then have to proceed to decide this isssue on the evidence before me , such law as has been argued before me and such law as I can by my own efforts obtain and cite. ..."

This ended the correspondence subsequent to the filing of the last regular post hearing memoranda filed herein by all counsel involved. The Board was left with the eerie feeling that there might be an issue before it that it should be addressing but which , as a result of the Appellant's final reticence , it is less able to address.

The land owned by Pierce Fisheries Limited to the south of South Street in the Town is shown on a survey plan (Exhibit B-32) made by R.L. Hunt N.S.L.S. dated NOVEMBER 3 , 1986 entitled " Plan of Survey showing lands of Pierce Fisheries Limited ". A short description of that lot extracted from that plan reads as follows:

Main northern boundary fronting on the south side of South Street 130.12' long;
Western boundary straight line running almost due south from South Street along the eastern boundary of lands of Larry Gaynor 242.34'
Southern boundary in 4 different courses running eastwardly to the west side of Church Street a total lineal distance of 240.51;
"Eastern " boundary in seven different courses runs a lineal distance of 361.31

The "eastern " boundary of the lot contains one 28.21' frontage on the west side of Church Street. In approximate terms the lot shown on the Hunt plan is a 4 sided figure fronting on South Street approximately 130'x 242' x146'x 242'with two roadway size protrubances extending eastwardly towards Church Street one of which joins Church Street and one of which fails to go so far. The Hunt plan is dated after the Town's Planning Advisory Commmittee (PAC) meeting dealing with this rezoning , and after the publication of the advertisement of the public hearing to deal with the rezoning but before the date of that public hearing and the Council decision complained of. According to the Hunt plan the lands of Pierce Fisheries Limited contain 40,215 sq.ft. and a docment concerning this land may be found in the relevant Registry of Deeds in Bk.112 Pg.394. This last document was not tendered to the Board and there is no indication if it was ever given to Council or to the PAC.

The text of the LUB amendment as contained in certified excerpts of the minutes of the Council meeting of November 13 , 1986 (Exhibit B-22) :

" ON MOTION COUNCILLORS SUTTLE AND STUART

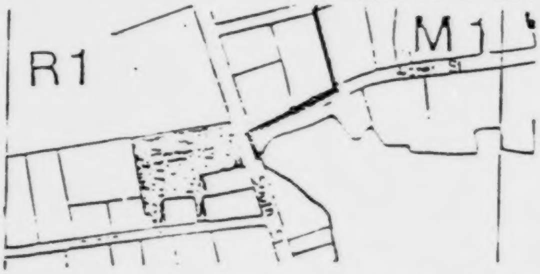
RESOLVED THAT THE COUNCIL OF THE TOWN OF LOCKEPORT HEREBY APPROVES AND ADOPTS AN AMENDMENT TO THE LAND USE BY-LAW FOR THE TOWN OF LOCKEPORT BY REZONING THE PROPERTY ON THE SOUTH SIDE OF SOUTH STREET OWNED BY PIERCE FISHERIES LIMITED FROM R1 RESIDENTIAL TO M1 INDUSTRIAL GENERAL. CARRIED BY A VOTE OF 5 IN FAVOUR AND COUNCILLOR BEBB ABSTAINING FROM VOTING "

In a Notice of Approval dated November 14 , 1986 and published at the request of the Town the following text appears:

"...HEREBY TAKE NOTICE that the Council of the Town of Lockeport did on November 13th ., approve the following amendment to the Lockeport Land Use By-Law.

THAT Schedule A of the Lockeport Land Use By-Law be amended by redesignating the subject property currently owned by Pierce Fisheries on the south side of South Street from Residential General (R1) to Industrial General (M1).

The subject property is indicated below:



The said plan with amendments may be inspected at the office of the Town Clerk ..."

The documents before the PAC and the public hearing contained essentially the same diagram as the advertisment of the Notice of Approval. The major difference between the land depicted in the Hunt plan (Exhibit B-32) and the land depicted in the other diagrams before the Board that is readily apparent to the eye is the absence of the 2nd (and northernmost) 30' wide finger of land extending between Church Street and the main bulk of the Pierce Fisheries Limited land . The interest to the Board in this obvious discrepancy is to determine what land the LUB amendment affects and then to determine how the decision of Council passing the LUB amendment tests against the intent of the Town's Municipal Planning Strategy (MPS).

All three counsel made opening statements to the Board .

These excerpts from Planning Act sections bearing on this appeal bear quoting here:

> " 63 (1) The amendment , ...by a council [of] ... the land-use by-law may be appealed by
> (a) an aggrieved person;
> ...
> (2) An appeal filed pursuant to subsection (1) shall be served on the Board within twenty-one days of the date of the publication of the advertisment required under subsection (3) of Section 60 ... .
> (3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.
> (4) The Board may
> (a) confirm the decision of the council ;
> (b) allow the appeal by reversing the decision of the council amending ... the land-use by-law ; or
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
> (5) The Board shall not allow the appeal unless the Board determines that the decision of council cannot reasonably be said to carry out the intent of the municipal planning strategy.
> ...
>
> 60 (3) Upon the passing of a by-law amending a land-use by-law , the council shall give notice of its passing by an advertisement in a newspaper circulating in the area affected ... ."

The Town had a Municipal Development Plan (MDP) dated October 1977 (Exhibit B-31). While the MDP was in effect the Town was preparing its present MPS which finally replaced the MDP pursuant to S. 50 (1) of the Planning Act coming into force on receiving Ministerial approval pursuant to S.50 (2) of the Planning Act on October 6 , 1986 .

In order to familiarize itself with the intent of the MPS the Board read the doument in full. Schedule B to this decision contains the provisions which have particular bearing on the present appeal , or at least were adverted to during the hearings , and which the Board finds useful to set out in a schedule format for easy reference in reading this decision:

The Town's LUB , Exhibit B-12 , was adopted and approved at the same time as the MPS. As stated in the MPS , the LUB is the main vehicle whereby the Town implements its MPS. For the purposes of this appeal the portions of the LUB necessarily to be considered are to be found in Schedule B immediately after the excerpts from the MPS.

Schedule "A" to this LUB is entitled "LAND USE BYLAW -TOWN OF LOCKEPORT-ZONING SCHEDULE"A" "and is dated May 1986. It purports to show to the scale of 1" to 400' all of the areas of land contained in the Town and most of the areas of the sea that also appear to be encompassed within Town boundaries.

As noted before , objection was taken by the Town and by the Applicant to the Appellant's status as an aggrieved person within the meaning of the Planning Act , and the Board heard evidence and argument concerning the same.

The facts pertaining to this issue are as follows:

1. Mrs Benham owns her own residence on a Lockeport size lot located on the south side of South Street near the base of a government wharf almost to the easternmost extremity of South Street.

2. The subject land is on the same side of South Street as is Mrs. Benham's House lot (approximately 1/2 way between the east and west end of South Street but rather nearer the

west end of South Street than to the east end of South Street).

3. Mrs Benham's mother lives under a life estate in a large house on a large tract of land marked "Locke Island" on Exhibit B-14 which is on the south side of South Street and abuts (or at least is very close to) the western boundary of the subject land. Mrs . Benham has no reversionary rights in this land and Mrs. Benham's mother is not an appellant to the Board.

4. Mrs Benham owns a vacant lot of land zoned R-1 on the west side of Water Street which runs through to the east side of Crest Street. This land abuts M-1 zoned land on Water Street which is occupied by buildings used in the fishing industry. Mrs. Benham's vacant R-1 lot is north of the subject land by the width of South Street and the width of the corner residential lot at the intersection of the north side of South Street and the west boundary of Water Street and thus is in close proximity to the subject lands. Mrs. Benham adduced evidence that her vacant R-1 lot was so close to the existing M-1 zone and industrial fish plant uses that the rezoning decision complained of did not affect the value of her vacant R-1 lot.

5 . Mrs. Benham owns a small house and lot on the north side of South Street in the vicinty of the intersection of South and Church Street . This lot runs north to the harbour and is occupied by a tenant , her son. This lot is also in close proximity to the subject lands. Mrs. Benham has adduced

evidence tending to show that the value of this small house and lot would be somewhat reduced as a result of the decision complained of. Her evidence showed that the market for residential real estate in the Town was very weak in the best situation and that general weak market would be made even worse for her small house and lot by the imposition of a M-1 zone on the subject lands in such close proximity to her small house and lot.

6. Mrs. Benham noted changes in large truck traffic patterns both along South Street and crossing over the pedestrian portion on the south side of South Street which would result from the proposed use of the subject lands as a place for the care and servicing of 4 large tractor trailer units used by the Applicant in fulfilling its contracts with the Clearwater Fishing interests who now own the subject lands subject to the completion of an conditional agreement of sale to the Applicant. (See the rest of the decision for more details of this contract and of the proposal.) Mrs. Benham felt these changes were of a nature to affect her lifestyle in the community in which she had chosen to live to the extent that she should be given status as an aggrieved person.

1-6 (supra) are a summary outline of the evidence given by , or adduced on behalf of , Mrs. Benham bearing directly on her status as an aggrieved person. The Board will deal with these evidentiary topics in numerical order first in the context of its interpretation of aggrieved person as set out in its own previous decisions on the subject commencing with the decision in Riverlake Residents Association v Municipality of the County of Halifax(1985) M.B.D.(Volume Four-B) 122{27} , summarized to that time in the decision in Woodworth and Schwartz v The Disrtict of East Hants NSMB-515-86-P{28} , and the later decision delivered by the Board on this topic in the appeal of Gertrude S. Finlayson v. The Town of Sydney Mines NSMB-559-86-P {29}.

1.& 2. The Board notes the detailed references to the " scale " of the Town (especially Locke's Island) contained in the MPS , recalls its automobile trip through all the streets on Locke's Island , and places particular emphasis on Mrs. Benham's testimony concerning the various locally perceived " boundaries " throughout the Town. The Board notes and accepts the testimony of the Town Clerk , Mr. Chymist , when he says in effect that the average shopper in Lockeport would rather get into his parked car on one side of a street and drive around the block to park in front of a store on the opposite side of the street and then go to that store than to walk across the street to achieve the same objective. In the perspective of these remarks and given the generality of mixed type of uses prevalent in the Locke's Island portion of the Town the Board is of the opinion that Mrs. Benham's own home property is separated from the subject property by 1/2 the width of the Town and is thus not sufficently proximate to the subject property that the rezoning of the subject property from R-1 to M-1 would cause any injury to Mrs. Benham by lowering the value of her own home. In the view of the Board , Mrs Benham has not proven she is an aggrieved person in respect to topics 1 & 2 which deal with her own home.

3. Mrs. Benham's mother's life estate in land very close to the subject lands can cause no injury to the Appellant , Mrs. Benham , which the Board may recognize and , therefore , Mrs. Benham has , in the view of the Board , failed under topic 3 as well to prove that for the purposes of this appeal she is an aggrieved person.

4. Mrs. Benham's own evidence indicates that the rezoning complained of will not adversely affect the value of her vacant lot which runs between Water Street and Crest Street and which is in close proximity to the subject property . Since she has suffered no financial or other recognizable injury in respect to this vacant lot , the Board finds that Mrs. Benham has not proven herself to be an aggrieved person under topic 4 either.

5. Mrs. Benham has proven that her rental property on the shore of the harbour is a residential property , is in close proximity to the subject lands , and has likely been diminished in value by reason of the effects on market value which would flow from the decison complained of . The Board finds that the Council decision to rezone will have a detrimental effect on the value of Mrs. Benham's rental property and thus be likely to injure , in a financial

manner , the Appellant Mrs. Benham. The Board thus finds under topic 5 that Mrs. Benham has proven herself to be an aggrieved person within the meaning of S. 63 (1) (a) of the Planning Act.

6.The Board regards the concerns of Mrs. Benham summarized under topic 6 to be much more nebulous than those dealt with in topic 5 , at least in respect to the question of her status as an aggrieved person. In view of its finding under topic 5 , the Board refrains from making the detailed analysis necessary to determine the merits of the issues raised under topic 6 and neither accepts nor rejects the arguments made on the Appellant's behalf under that topic.

Mr. Ledrew , citing the Supreme Court of Canada in B.C. Development Corporation v. Friedmann (Ombudsman) [1984] 2 S.C.R. 447{26} (a case not cited in Riverlake {27} or any of the Board cases listed above since Riverlake {27}) , argued that this Ombudsman {26} case was of the highest authority , was reported before the decision in Riverlake {27} and effectually demonstrated that the Board was wrong in its interpretation of the words "aggrieved person " in the Riverlake {27} decision and in all its subsequent decisions which followed Riverlake{27}'s definition of "aggrieved person". Mr. Ledrew stated that the decision in Ombudsman so widened the definition of "aggrieved person " that almost anybody could gain status as a qualified appellant and that , in any event , under the definition of "aggrieved person" established by the Ombudsman {26} decision Mrs. Benham was an aggrieved person for the purposes of this appeal.

Mr. Larkin argued that the Ombudsman {26} definition of aggrieved person had no application to Mrs. Benham's status in the present appeal for one or more of the following reasons:

1. There were such great differences between the relevant legislative objectives of the Planning Act of Nova Scotia and the relevant legislative objectives of the Ombudsman Act R.S.B.C. 1979 , c.306 that the judicial definition of aggrieved person giving jurisdiction to the B. C. Ombudsman under the latter statute was of no assistance in determining the category of aggrieved person under the Planning Act.
2. That , even if he were wrong in argument 1 (supra) , Mrs. Benham could not qualify as an aggrieved person even under the definition of aggrieved person set out in the Ombudsman {26} decision.

Essentially the same arguments and many of the same citations have already been set out in an appeal already heard before the full Board but not yet decided by that Board at the time argument was completed in this appeal. The full Board has since filed its decision Backman v.City of Halifax NSMB-562-86-P{30}. At p 27 of that filed decision the Board had this to say:

> " The Board in this case is reasonably satisfied without invoking the Supreme Court of Canada decision in British Columbia Development Corporation et al v. Friedmann that the Appellants ... are aggrieved persons... . By applying the

B.C. Development Corporation case to these Appellants there is no doubt that they are 'aggrieved persons' "

In these circumstances , the Board (as constituted for this appeal) believes that definition of "aggrieved person" as delineated in the Riverlake {27} line of cases is a more restrictive definition of "aggrieved person " than the definition of " person aggrieved " as set out in the Ombudsman {26} decision and since the Board has already been able to find that Mrs. Benham is an " aggrieved person " even under the Riverlake {27} definition of the phrase , the Board finds it unnecessary to determine in this appeal the effect if any of the .Ombudsman {26} decision on the definition of "aggrieved person " as set out in the Riverlake {27} line of decisions. If the Board had to make that determination it would easily follow the lead set by the full Board in Backman {30}.

The Board finds that Mrs. Benham is an aggrieved person and thus a qualified appellant. As stated before , all procedural matters necessary to perfect the appeal have been performed. The Board therefore assumes jurisdiction to hear this appeal.

The Appellant gave evidence herself. Her counsel , Mr. Ledrew called as witnesses in support of her appeal Leo Fourdraine , St. Claire Roache , James Crosby , Hilton Chymist , and Evelyn Guye. Mr. Larkin , for the Town examined (during the time ordinarily provided for cross-examination) in detail Mr. Chymist , who is Town Clerk , and afterwards called Kim Stewart .

Mr. Hood , for F. Pierce Trucking Limited , the Applicant before Council (otherwise herein called the Applicant) called its president , Forrest Pierce.

Leo Fourdraine , is a history teacher in the Town and has lived in the Town since 1970 on the north side of South Street " kitty corner " from the proposed development . He describes that area of the Town as a " beautiful residential area ". He gave a great deal of testimony as to the Town , Locke's Island , the nature of the community all of which seemed to corroborate the general conditions of the Town spelled out in the MPS (and many of which are contained in the extracts from the MPS set out above). He described Locke's Island as " the Town of Lockeport " and said that it was shaped like a figure "8" with South Street forming the waist of that figure "8" and providing the dividing line between the north and south portions of the island. South Street is the only land access for the inhabitants of the southern portion of the island to get to the mainland and the rest of the island. South Street is used by the children as a road to and from school. All the vehicular traffic for the south end of the island must use South Street as its access road.

Mr. Fourdraine said he was familiar with the Applicant's proposal for the use of the subject lands. This use was for the storage , cleaning , repair of tractor trailers for the

Applicant's business as well as office space to manage that business.

Mr. Fourdraine said most heavy tractor trailers which came to Lockeport entered the island through the only entrance street , Locke Street , turned north on its intersection at Hall Street (which was a turn of slightly more than 90 degrees and is the busiest intersection in town) , turned east (with the same type of turn) onto Beech Street until it came to the intersection of Water Street on which the main fish plants were situate. On leaving town , the same tractor trailers would reverse the same route.

Mr. Fourdraine was shown the area on the Future Land Use Map (B-13) designated Industrial lying to the south of Beech Street intersection with Water Street and to the east of Water Street and to the north of South Street appearing to designate land that lay in that area repectively between the east Boundary of Water Street and the west side of the harbour , and between the north side of South Street (immediately opposite the subject lands) and the south side of the harbour . He said that in that area there was no land except "the edge of the road" above high tide mark. " There is no property there at all." [In the rest of this decision this area will be referred to as the " dipper "] He estimated that the nearest fish plant to the subject area is a " couple of hundred feet away." When showed a photograph of the area of the " dipper " he noted that there had been a landfill operation at the north portion of the picture some considerable distance from the north side of South Street and also some landfill on the north side of South Street to the east of the subject property (on the other side of the street , of course) .

Mr . Fourdraine held the opinion that all trees on the subject property had been cut down. He said there were residential buldings to the east south and west of the subject property. All these properties receive water service from their own wells. These properties have water supply problems depending on the degree of dryness of the summers.

Mr. Fourdraine felt there was vacant industrially zoned land on Water Street adequate to contain the Applicant's proposal. He was unaware of the ownership of that land or whether it was available for sale to the Applicant.

Mr. Fourdraine , at the public hearing concerning this proposal , did not oppose the proposal itself itself , but felt that no rezoning was necessary and that the proposed use was commercial which could be allowed , with strict controls , in an area designated Residential by the device of a development agreement which could be so constructed that the Applicant's proposal would be allowed but other more objectional uses ordinarily allowable in a M-1 zone would be prohibited. Mr. Fourdraine felt that rezoning the subject property to M-1 would permit uses other than those proposed by the Applicant and those other permitted uses could be much more objectional than the uses proposed by the Applicant.

Mr. Fourdraine at that meeting objected that the rezoning would reduce the value of his own property and , in fact , he has , subsequent to the rezoning , appealed his assessment downward because of the effect he says the rezoning has on the value of his property. He believes that his property value may be reduced 10% on account of the rezoning.

Mr. Fourdraine noted that quite a bit of work had been done on the subject property subsequent to the rezoning and prior to the commencement of the hearing of this appeal.

Mr. Fourdraine's main concern with the proposed rezoning was the "cancerous effect of the zoning-it spreads."

St. Clair Roache , a teaching principal at Ragged Island Consolidated School , resides on Church Street in Lockeport in a house located on the fifth property starting from the south end of Church Street , his property being about 7 properties south on Church Street from the subject land . From the perspective of his residence , he described the nature of the Town. His evidence agreed in most material particulars with that of Mr. Fourdraine. He said a few tourists used the parks in the southernmost end of Locke's Island.

St. Clair Roache described the large old house which was formerly situate on the subject land. He believed it to have had historical significance (although not designated under the MPS as an heritage property) but it is now torn down and the recent work done to the site and the exposed flooded excavations constitute a hazard to children.

He agrees with Mr. Fourdaine that , at all relevant places , there is no land between South Street and the sea and Water Street and the sea in the " dipper " until you get 200 feet north along Water Street from its intersection with South Street.

St. Clair Roache said his house was serviced with a dug well and " the summer before last " he was without water in the well for most of the summer. His well usually only goes low in any summer but the wells of some of his neighbours go dry on a regular basis each summer.

St. Clair Roache's prime concern is for the pedestrian traffic that will have to pass by the subject property on its frontage on South Street. The " sidewalk " at this point is merely a few feet on the pavement on the south side of South Street designated for pedestrians by a yellow line painted on that pavement parallel to the edge of the pavement . There is no curb to separate the vehicles and pedestrians. He says that at this (and other) points on South Street two large vehicles cannot pass and " maintain the highway " and to pass they must encroach on this sidewalk area. St. Clair Roache claims that the intersection of Water and South Streets is inconvenient for pedestrians and this condition will be exacerbated by the proposed use of the subject lands.

Mr.Roache feels that the "10 wheeler trucks" which have 2/3 of the capacity of the Applicant's tractor trailers and which are used to service the fishing industries located on the government wharf at the far east end of South Street are able properly to negotiate South Street without encroaching on the the "sidewalk".

Mr.Roache did not attend the public hearing as he "was unaware of it." He does not know how many councillors there are in the Town or who they all are.

James Crosby , manager of Central Trust Company in Yarmouth , explained that Central Trust Company is a successor company to Nova Scotia Trust Company and that Nova Scotia Trust Company is the trustee of the Estate of the late Gordon B. Mackay which consists mostly of land in the Town on the south side of South Street and being that large parcel of land marked " Locke Island " on Exhibit B-14 and thereon shown as being immediately to the west of the subject property. Mrs. Mackay , the widow of the late Gordon B. Mackay and the mother of the Appellant , occupies the property under a life estate granted her under the same will appointing the Nova Scotia Trust Company trustee.

As such trustee , the Central Trust feels it may have to sell this land in the course of its duties in the administration of the Mackay estate and it is therefore concerned that the rezoning complained of may reduce the sale price of the Mackay land. Mr. Crosby is mostly familiar with the Mackay land by his study of the Central Trust file on the property. He says that file indicates that the property is insured against fire losses in the amount of $64,000.00 . The trustees are negotiating with solicitors of the life-tenant with a view to subdividing the property and these negotiations had been ongoing since 1982 when the "monetary assets " of the estate had run out and the trustee needed a cash flow to continue its smooth administration of the estate.

Mr. Crosby felt that the presence of the industrial use on the subject property would detrimentally affect the value of the Mackay land .

Mr. Crosby does not know the name of the proctor of the estate. He had received notice of this hearing in the mail. He then consulted with his head office. On the advice of his head office , he decided to appear in person at this hearing pursuant to the trustee's responsibilities to participate in the deliberations. According to Mr. Crosby the estate could not afford to be represented at the hearing by counsel. Noise and fume pollution from the proposed industrial use would , in the opinion of Mr. Crosby , cause a reduction in value for residential development of the adjacent Mackay property. When confronted with the picture of the previous building on the subject land , and the prospect of its longterm vacancy prior to its demolition , Mr. Crosby agreed that the demolition of the old house on the subject property enhanced the value of the Mackay property for residential development.

Mr. Crosby does not have any special expertise in valuing properties and has not made , or caused to be made , any appraisal or other valuations of any properties in the Town. Regardless of his lack of particular expertise on land valuation in general and the market conditions in Town in particular (frankly admitted on cross-examination) , Mr. Crosby feels "common sense " would dictate that the Mackay property would be a more attractive piece of property to purchase if it wasn't next to an industrial site. In the same "common sense " context , he felt that even the former delapidated residential use would be less injurious to the sale value of the Mackay property than the Industrial site proposed.

The Appellant Lillian Benham gave evidence. She lives in an older residence on the east end of South Street , the second property from the sea as shown on exhibit B-13 . She is a retired librarian and has been a former councillor of the Town and a former chairperson of the PAC. During her lifetime she has lived at various addresses all within the Town on Locke's Island. She testified in concert with Mr. Roache and Mr. Fourdraine as to the character of the Town . Unlike Mr. Roache , Mrs. Benham did not attend any of the meetings of Council or the PAC meeting or even the public hearing which dealt with the proposed rezoning. She said her mother's illness at the time took up all her spare time at the times of those meetings. She said she asked someone to present her views at the public hearing but that the instructions to this person were not accurately followed.

She referred to the M-1 zoned areas to the south of South Street and noted that they were both in existence before the advent of any official town plan concerning zoning and the one property which runs north from South Street to the harbour is almost invisible as an industrial property because of the building itself and the care taken of its surrounding yards.

Mrs. Benham , as mentioned above in this decision when the Board was discussing the issue of status of the appellant , gave detailed evidence of the scale of the Town particularly that part located on Locke's Island which she desribed as " island scale" . As an example the houses on the height of Crest Street , although on the opposite side of the street from the main industrial fish plants , overlook the same because of the height differential . In the minds of the inhabitants of Crest Street , they have a scenic view of the harbour unmarred by the existence of the adjacent industrial uses. According to Mrs. Benham , the people of Lockeport have many such boundaries in their minds when dealing with the scale and character of the Town and the MPS reflects these "boundaries of the mind " and must be taken into account by anyone attempting to understand the intent of the MPS.

Mrs. Benham believes that the purpose of the proposal is to put in another location the function that has "always " been done on Locke's Island , namely that " Pierce Trucking take fresh fish from Pierce Fisheries to the market."

Mrs. Benham stated as well (in regard to the " dipper ") that there was no land between the east boundary of Water Street and between the north boundary of South Street and the highwater mark of the harbour south of the old John Day blacksmith site (which can now be seen as a landfill site extending some 75' east from Water Street and some 200' to the north of South Street). Any land in the area described is merely the " shoulder of the road ". In 1838 a 20' strip of land was given by the owners of the property there to the Town for the width of Water Street and there is no land there outside the boundary of Water Street. On the west side of Water Street the Appellant has an ownership in a residential property that is 112' along Water Street , then there is the adjacent residential property which is 115' along Water Street so that the industrial uses are at least 227' from the north side of South Street . On the east side of Water Street , the area of the old blacksmith shop (close to 200 ' to the north of the north side of South Street) is the closest area of industrial use land above high tide level.

Her main concern in this appeal is not the proposed use of the subject property but the worst possible use that the subject lands may be put to once they are rezoned M-1.

Mrs. Benham refuses to believe that the size of the land rezoned does not allow for the full application of the LUB as regards the imposition of an Industrial use in an area designated residential.

Mrs. Benham is concerned that the freshwater demand of the proposed use will necessitate a drilled well on the subject lands which will adversely affect the water table of the residential neighbours of the subject property and their already sparse water supply will likely be further diminished if the proposal proceeds.

Mrs. Benham believes there are two deciduous trees to the east side of the subject property . On the west side of the subject property there is one deciduous tree inside the Mackay estate property and some evergreens on both sides of the driveway that leads back to the Mackay house. These are all the trees presently available to buffer the residential lands surrounding the subject property from industrial uses proposed for the subject property. Most of these surrounding properties have residences in close proximity to the boundaries of the subject lands.

Mrs. Benham believed that on the mainland portion of the Town on the North Lockeport Road there were numerous spaces where the proposed development could be be better accomodated than it is in the subject lands without impinging to an extensive degree on surrounding residential uses.

Mrs. Benham listed properties in the Town located on Locke's Island:

1. Her home property at the south side and near the east end of South Street.

2. Her rental property on the North side of South Street.

3. Her interest in a vacant property that extends from Water Street to Crest Street.

4. Her interest in a property on the west side of Hall Street just North of South Street.

Mrs. Benham believes that when the tractor trailers must complete the evolution of backing into the proposed site they must proceed east of the subject property on South Street and then block South Street while they are backing and turning south or they must proceed east on South Street then head north on Water Street stop on Water Street and then back across South Street to park on the proposed site tying up traffic on South and Water Streets at the same time.

Mrs. Benham feels that the proposed development will interpose an industrial area in a former residential area and will face all the inhabitants of the south end of Locke's Island with the problem of now having to drive through an industrial area to arrive at their homes-it will have the effect of putting them onto " the wrong side of the tracks."

Mrs. Benham , on cross-examination by Mr. Larkin , said she was motivated to commence this appeal because of her views that other potential appellants would not launch an appeal on their own behalf because of an apprehension that the Applicant might be able to retaliate against them in some manner outside the Planning Act process and that was a "strong motive " influencing her commencement of this appeal. She also said that she had some personal motivation , also , based on her property ownership and on her own sense of outrage and inconvenience which she feels having to drive through an industrial zone from one end of South Street to the other. She expressed a sincere interest in the Town and she feels this proposal is not in the best interests of the Town.

Mrs. Benham had been instructed as a councillor in the 1950's by experts as to the working of the water tables in Locke's Island and how the geology of the area affected the fresh water supply of water users on the island. Based on those explanations and her knowledge of the sometime sparsity of the water in domestic wells , she formed the opinion that the proposed development located where it was would likely adversely affect the water supplies in the wells of the residential neighbours to the proposed development.

Hilton Chymist , Town Clerk-Treasurer , among his other duties as Chief Administrative Officer of the Town , keeps the minutes of the PAC and the Town Council . Those minutes are not verbatim but are summmary records of the proceedings and contain all the decisions arrived at.

In regards to the present rezoning , he set out the following chronology :

1.Letter from the Applicant (Exhibit B-16) dated October 9 , 1986 , requesting rezoning was referred to PAC.

2. Mr. Chymist notified the Chairman of the PAC concerning the request for rezoning and then phoned Kim Stewart , the planner , to review the request for rezoning in light of the Town's MPS and then set a meeting date for the PAC.

3. The PAC meeting was held (October 15 ,1986) and at it the letter was read and the proposal was discussed. The committee then recommended to Council that Council take the necessary steps to approve an amendment to our zoning map [emphasis by the Board].

4. The matter was brought to the attention of the Mayor who put it on the agenda for a special council meeting on October 16 ,1986. Council decided the issue in the absence of any written report from the PAC but had an oral recommendation from the PAC before it. The PAC report was dated October 17 , 1986.

5. At that Council meeting a resolution was passed by Council giving notice of its intention to rezone the subject property from R-1 to M-1 and setting the date of a public hearing on the rezoning issue to be held On November 13 , 1986.

6. Notices of the public hearing were published in the local papers at some time between October 17 and November 13 , 1986.

7. The public hearing was held on November 13 , 1986. People spoke at the public hearing both for and against the rezoning.

8. At the end of the public hearing the Council met in special session on the same evening and passed a resolution adopting the amendment herein appealed.

9. Construction was started on the site without a development permit having been granted while this appeal was outstanding and the Town sent the applicant a registered mail letter (December 17 , 1986) protesting these actions and the witness met with agents of the Applicant and discussed the matter with them (January 20 , 1987).

Mr. Hood declined to cross-examine this witness. Mr. Larkin , for the Town , conducted his cross-examination of this witness almost as if it were a direct examination of his own witness and he used much of his examination time in eliciting many of the details of evidence he thought necessary to support the Town's position in this appeal. In result this well thought out technique was helpful in bringing out the facts without the necessity of having Mr. Chymist recalled at a later time when the Town had the burden of adducing evidence. By allowing Mr. Ledrew some extra latitude on reexamination , the Board was able to ensure that the Appellant had adequate opportunity to "cross-examine " a witness of the opposing side. Mr. Chymist , for his part , impressed the Board as a person attempting to be fair in the giving of his evidence.

Mr. Chymist says on a rezoning application he is aware of , and advises PAC and Council of , the criteria in the MPS , LUB and other Town By-laws and regulations concerning such zoning by-law amendments. He says he ensures on a rezoning application that there is a report to Council that documents all the important considerations which ought to be before Council before the decision on rezoning is made by Council.

Mr. Chymist attended practically all of the meetings of the PAC and Council which had to do with the drafting and passage of the MPS and the prior MDP which it supplanted. At the PAC meetings with Kim Stewart complete reviews were made of the MDP and the LUB made pursuant to that MDP. They also considered the drafts of the MPS and the present LUB before those drafts were presented for discussion before the PAC and Council. Four years were spent by Mr. Chymist in this process before the approval of the Minister gave legal effect to the present MPS. Two years of preparatory work on the MPS were done with another planner and then Ms. Stewart became planner and the process was started over again " from page one " under her direction about 1 1/2 years before the adoption of the present MPS. In that period the PAC held at least two meetings a month considering the drafting of the MPS and its concurrent LUB. The PAC had the goal of getting the MPS and LUB approved before the date of the next Council elections and worked with that deadline in mind.

Mr. Chymist started work with the Town 12 years ago. He gave considerable evidence of the history of the Town during that time . His testimony agrees with the general outline of the growth rates in the Town and the other conditions of the Town which are set out cogently in the MPS. In 1973 the Pierce Fisheries Plant at the north end of the inner harbour was destroyed by fire and was never rebuilt. In 1975 " the operation " at the south end of the inner harbour became available to Pierce Fisheries (former Swim Brothers plant). Prior to this change the Swim Brothers plant was used mostly to process groundfish. Pierce Fisheries used the plant more to process scallops and lobsters. Mr. Chymist feels that as a result of the 1973 fire and the 1975 change there was a net loss to the Town of " as much as 100 jobs." At the end of these two evolutions , the net work force employed in the final successor plant stabilized at about 60 jobs. In 1980 National Sea Products plant was destroyed by fire and that Company's operation was down until 1983.

As a sequel to (if ,indeed , not as result of) these two fish plant fires , commercial activity in the Town diminished and a number of clothing store and grocery stores in the Town closed down. The population went down as well. In 1967 the population was 1284 and in 1986 the population was 910. Mr. Chymist belives the Town needs economic development to help stabilize its tax base. Mr. Chymist noted that the new National Sea plant had been valued much higher than the old National Sea plant it had replaced. He further noted that the Town's tax base had been considerably reduced as a result of industrial assessment appeals. The latest residential assessment roll filed with the Town shows a general decline in the residential assessment in the Town of about 7% below the residential assessment of the Town for the previous assessment year. Mr. Chymist says the market for residential real estate in the Town is flat and that it is not uncommon for a residential property to be listed for several years before it sells.

In the last 5 or 6 years Mr. Chymist says that there have been several small independent fish buying stations located around the inner harbour on both the north and the south breakwaters. Generally the persons who established these buying stations buy from their own boats but these stations carry out no processing operations and usually put their products on trucks and ship to the American market unprocessed. Compared to the fish processing operations the buying stations generate little economic activity in the Town. According to Mr. Chymist , the fishing industry is the lifeblood of the community.

The Town has tried to diversify into other fields of economic activity but Mr. Chymist says each time it has tried to date it has " come up flat."

Mr. Chymist says that one of the main concerns in the process of changing the former MDP was to make the new MPS and the LUB more understandable than their predecessors. In practice the old MDP was somewhat hard to work with in the following respects:

1.There was not much " room " to increase industrial zoning.

2.The breakwaters were not designated industrial on the theory that the Town had no authority to designate such federally controlled areas.

3. In " the spit and around the turn " [the " dipper "] area was not designated Industrial.

4. The future land use area map showed the difference between high and low tide marks perhaps making for imprecision in zoning.

There had been some land fill operations north of " the spit and around the turn" [the "dipper "]. The PAC did not not know what federal arrangements Pierce might have had permitting additional land fill south from the existing fill along Water Street to South Street and thence east along South Street. Mr. Chymist said the PAC considered it reasonable that this process of landfill could continue and therefore the Industrial Designation should include that area which might be filled in the future. If it were in fact filled , it could be used without having to go through all this lengthy process for Industrial designation which would require an MPS amendment. Mr. Chymist says that based on his observation " yesterday " there was "4 or 5 ' of land outside the rail ". "Yesterday's " observation was undoubtedly made by Mr. Chymist when he escorted the Board to the site and occurred at the same time as the Board made its own observations.

Mr. Chymist was referred to the MPS. He noted that the lands to the south of of South Street zoned M-1 were to be designated Residential on the Generalized Future Land Use Map. They were zoned M-1 to recognize their existing uses at the time of approval of the plan but designated Residential on the Generalized Future Land Use Map in order to prevent out-of-lot expansion of the Industrial Zone into the adjacent residentially zoned land based on the adjacent industrial zoning. Mr. Chymist said this was the clear intent of the MPS. He also stated that the intention of the MPS was that the existing M-1 zone in the area correspondingly designated Industrial on the Generalized Future Land Use Map could be a base for an extension , by Zoning By-law amendment , of the M-1 zone into a residential zone to land in that residential zone immediately adjacent to the M-1 zoned and designated land and no further. The land thus rezoned would be a M-1 zone in a residentially designated area and could not serve as a base for further extension at some later time of more M-1 rezoning in a residential zone. The M-1 zoned lands already lying on South Street and to the south thereof fall , as well , into this last mentioned category and cannot serve as a base for extension of the existing M-1 zone.

Mr. Chymist noted that there were few places on the island where the residential areas were not infiltrated by commercial and industrial uses and the MPS reflected this reality. Mr. Chymist has the opinion that the proposed use is an industrial use , is not appropriate to be located in a commercial zone (which allows development agreements) and is only appropriate in an industrial zone (The MPS does not provide for development agreements for industrial uses in an industrial zone).

Mr. Chymist holds the opinion that the word " adjacent " as used in the actual policies of the MPS allowing for rezoning of residentially designated areas which are adjacent to industrially zoned and designated areas means " immediately adjacent " (the general text supporting the detailed policies uses the phrase " immediately adjacent ") ; that the intrusion of industrial zoning into residential designation can only go the depth of one lot into the immediately adjacent residential land. He futher holds the opinion that the land use documents regulating the plan show that the streets themselves are not shown as zoned on the zoning map but are zoned to the center line of the street by the effect of the bordering zone of the land on each side of the street. By applying these opinions to the facts of the present appeal , Mr. Chymist said that the south side of South Street was zoned and designated Residential and this zoning extended northerly to the center line of South Street were it met the southward extension into the street of the Industrial Designation in the area bordering the north boundary of South Street. Thus he was able to decide that the factual situation arose under the terms of the MPS where an industrially designated area was immediately adjacent to a residential area and thus Council was permitted by the MPS to consider the southward extension of an industrial zone into a residentially zoned and designated area. The text of the rezoning resolution gives the impression that only one lot was encompassed in the rezoning. Mr. Chymist feels that , as used in the MPS "adjacent " means " immediately adjacent " and , although both phrases are used in the same context of meaning , they mean for all purposes relevant to this appeal " immediately adjacent . ... the next lot and that's it." Mr. Chymist considers the water as " a natural barrier " which would intervene between two zones preventing them from being " immediately adjacent " within the meaning of that term as used in the MPS to give rise to the present rezoning.

All over Town , said Mr. Chymist , vehicles get access to the lots adjacent to streets by crossing over sidewalks and and the areas of the streets used as sidewalks and this traffic generated onto this site from South and Church Street will not be of an exceptional nature for the Town nor will the anticipated traffic be much higher than if the subject lot were developed for its residential use. The Town has no history of collisions ocurring between pedestrians and trucks on the sidewalks. Mr. Chymist said there is , for Lockeport , more pedestrian traffic on South Street near the subject property than on some other residential street in the Town , but there are other streets in the Town with much more pedestrian traffic than occurs on the portion of South Street in question . In any event , by any objective standard , the pedestrian traffic cannot fairly be described as heavy.

Mr. Chymist says there have been problems all over Town with dug wells from time to time but he says the land in question is both low land and wet land and he would not anticipate any problems for the fresh water supply for the proposed development.

Mr. Chymist feels the size limitations of the subject lot will invoke various restrictions contained in the Industrial Zone provisions of the LUB and of the Building By-law which will prevent , on this site , many of the worst case scenarios for development envisaged by Mrs. Benham which ordinarily could occur in an Industrial Zone.

Mr. Chymist believes that at the public hearing stage of a rezoning application statements from the general public are welcome and solicited but comments from Councillors are , at that stage , inappropriate.

Mr. Chymist is positive that the publication of the notice of passage of the amendment to the LUB was published on the Tuesday following the date that is on the notice (November 14 , 1986) which would be November 18 , 1986.

Mr. Chymist says the present proposal cannot be accomodated by a development agreement without a prior major amendment to the Town's present MPS.

Mr. Chymist says that such construction as was done by the Applicant on the subject site was done without any of the required permits.

Mr. Chymist spelled out the relationship of Kim Stewart as liason planner for the Town. Ms. Stewart assists the Town and various other municipalities with planning advice.

Mr. Chymist said the Town had no inventory of streets . From this and other comments of this witness the Board deduced that the Town had no survey of its street boundaries and that one had to see the street (in the absence of survey) to ascertain the boundary of any street. The Town has no set street widths and thus , according to Mr. Chymist , the Town can claim only that portion of the street that is in use as a street. The Town has not expropriated for streets in the Town.

The only survey evidence before the Board of the boundaries of South Street and Water Street near their intersection is contained in Exhibit B-32.

That plan of survey of the subject lands shows the width of South Street at the northwest corner of the subject lands as being 36' and does not purport to be a survey of the north boundary of South Street and does not show whether there is any land north of and abutting the north boundary of South Street (in the area of the " dipper ") . Neither does it show any shore or water in that position. Although Water Street intersects South Street on the north boundary of South Street at or about the area shown on the plan no allusion to that intersection is made on the plan and thus the plan does not even admit the existence of Water Street let alone its width or whether there is any land between the east side of Water Street and the sea.

Mr. Chymist made it abundantly clear on reexamination that he interpreted the phrase " adjacent " as used in the MPS to govern this rezoning application (and others like it) as meaning "immediately adjacent " or " abutting ". He felt that the industrial uses zoned Industrial lying adjacent and north of South Street and also to the south of South Street were intended in the MPS to be " merely tolerated , not desirable ... in a residential area " and thus were made incapable of expansion over their existing boundaries under the MPS . They were not left as nonconforming uses .(This fact shows the Board that the MPS intended , on the other hand , that these " misplaced " existing industries would be capable of being preserved and upgraded or changed to some other allowable industrial use within their existing boundaries.)

There was no survey plan of the subject lands , said Mr. Chymist , shown to and discussed before the PAC or Council for the present rezoning. Mr. Chymist believes the Town's jurisdiction does not extend below "mean high water mark " on the shore of the ocean facing the Town.

Mr. Chymist did a "window survey " of the properties on John Street , Church Street , and South Street east of the site of the proposed rezoning and determined that there were approximately 39 persons of school age or below presently living in those portions of the Town.

Mrs. Evelynn Guye was the final witness for the Appellant. Mrs Guye was qualified as an expert entitled to give opinion evidence concerning the market value of residential properties within the Town. That portion of her evidence that the Board found germane to this appeal was applied earlier in this decision when the Board was disposing of the issue of "aggrieved person " and will not be further commented upon here.

Mr. Hood , counsel for the Applicant , called Forrest Pierce , president of the Applicant as his first and only witness . The subject land was formerly owned by Pierce Fisheries and was included in the sale of that company to the Clearwater interests . The Applicant then negotiated for the conditional resale of the subject property to itself from Clearwater. The sale transaction " will be concluded when the land is rezoned " and is contingent on the rezoning.

The Applicant was incorporated , at the time of the sale from Pierce Fisheries to Clearwater , to continue the shipping of fresh fish for Clearwater to the markets in the United States. Four new tractor trailers costing about $500,000.00 were purchased by the Applicant to service this American fish trade.

Mr. Pierce said that the subject land is being purchased with the intention of demolishing the residential building located upon it and replacing it with a Butler type steel building which would house the offices of the Applicant , and would also provide space to do maintenance and light repairs to the Applicant's trucks.

Mr. Pierce said that the tractor trailer fleet of the Applicant contains 2 to 4 trucks to service the needs of Clearwater in Lockeport. Each week approximately 2 round trips per truck to Boston would be the ordinary demand for such trucking. In addition there are longer distance hauls going as far as southern Georgia and that round trip Georgia haul would take the truck approximately one week. All four trucks will not necessarily be loading in Lockeport since the truck hauls may originate at points other than Lockeport . When loading in Lockeport , the trucks are parked at the Pierce Fisheries location on Water Street (some distance north of the subject property) . Mr. Pierce goes on to say that there is no intention to park the loaded trucks on the subject property while waiting for their departure time. Mr. Pierce says that the primary purpose of the Applicant's proposed development on the subject land is to do " maintainence schedules " of , light repair of , washing of , trucks. Trailers parked on the lot would not be parked with motors running to drive the compressors for their refrigeration units. Any trailers requiring to be parked with running compressors would be parked as they have been " these last 15 years " on the Pierce Fisheries property.

Mr. Pierce says the Applicant proposes to fence the subject land around the " rectangular " part of its boundary , to pave the parking area and to plant some trees on the front of the building.

Mr. Pierce says the Applicant intends to employ 8 people in its operation. It will service only the Company vehicles. Normal office hours of this operation will be 8.00 A.M. to 6.00 P.M. six days a week. In order to avoid the extra cost of overtime hours , the Applicant will strain to keep maintainence within the hours stated above.

Based on experience since 1972 , Mr. Pierce says that the tractor trailers used under his direction (at times as many as 7) have operated in the Town with no injury to pedestrians in the Town. He feels his present drivers are careful and will continue to drive in the Town with a high regard for pedestrian safety. According to Mr. Pierce , the truck traffic generated by the proposed development has been in the Town located elsewhere for a number of years. Traffic will be relocated within the Town without being increased because of the present proposal. To date there has been no increase in the product to be trucked resulting from the corporate realingment alluded to above. Mr. Pierce says that the Applicant's trucking operation " displaces a good portion of the trucking operation formerly carried on by Pierce Fisheries ". He says that traffic will only increase

(or decrease) with the amount of product produced by the fish plant serviced by the Applicant's trucks. In short , Mr. Pierce doesn't see " any difference in the amount of traffic ... over what's been hauled in the past." Mr. Pierce feels that the nature of the product loaded on the trailers will continue to determine which route the drivers will use to get out of Town. If the loaded product is frozen , the trailers are so pointed while loading that their trucks will make a Beech Street exit. If the trailers are loaded with fresh product , it is usually trucked through the South Street exit. The plant ships more frozen fish so the bulk of the truck traffic mostly exits through the Beech Street exit. Mr. Pierce expects these tendencies to continue unaffected by the location of the Applicant's proposal .

Mr. Pierce noted that while preparing the survey plan (Exhibit B-32) the surveyor had reported to him that a survey on the ground according to the deed description would show that a certain neighbour's house is within the Applicant's South Street property . Mr. Pierce instructed the surveyor to adjust the boundary lines in favour of the encroaching neighbour to avoid any problems with that neighbour. He was not aware of the subject lot having two projections reaching westward to Church Street as shown in the diagrams advertising the rezoning application both before and after the decision of Council.

Mr. Larkin , for the Town , called Kim Stewart , liason planner employed by the Department of Municipal Affairs , as his first witness. Exhibit B-33 contains Ms. Stewart's curriculum vitae demonstrating her qualifications as a planner which were accepted by the Board (on agreement of counsel) allowing the Board to accept her evidence as a community planner qualified to give expert opinion evidence concerning planning matters as they might affect the Town. Lockeport , Shelburne and Wolfville have no in-house planner and Ms. Stewart , assisted by the respective development officer , deals with planning matters in each of those towns. Although she is a provincial employee , Ms . Stewart is , in effect , the Town's planner on a part time basis .

About 2 years ago , Ms. Stewart became involved as the Town's planner and was highly instrumental in the preparation of the Town's MPS and the LUB. The opinions given her by others indicated the MDP was too complex for such a small town and should be simplified so that it could be more easily understood by the persons who had to use it. Changes made in drafting the MPS in order to reduce the complexity of planning regulation in the Town:

1. The number of zones and general land use designations were reduced.
2. Home occupation provisions were relaxed.
3. Minimum residential lot sizes were reduced to much more usable dimensions .
4. The town center area was expanded to encourage the promotion of town center uses.

5. The wharf areas and the " dipper " were designated and zoned Industrial. Ms. Stewart said that under the MDP there was a perceived problem that the wharves were not designated and not zoned and several fishing sheds had been built on them . People were complaining that those sheds are being built without any controls in a manner inconsistent with the objectives of the MDP. This lack of control was a great drawback to the officials administering the MDP because those officials found it difficult to explain to persons who had solid land to develop why they should voluntarily comply with the MDP when other people were developing on the wharves free of controls under the MDP. "It was [federal] government property and indirectly ... they don't have to come to the Town at all for approval , but we decided that we would zone the wharf area industrial , designate it industrial... so that any development that goes on there with fishing activity is seen to be in conformity with the plan even though they don't have to ask for any development permit from the Town [emphasis by the Board] ."

Ms. Stewart was asked to compare the Future Generalized Land Use Map in the MDP with the Future Generalized Land Use Map in the MPS specifically in regard to the Industrial Core Designation on Locke's Island. She said the major change in the new plan was the Industrial Designation of the wharves (mentioned above) and the Industrial Designation of the east side of Water Street to South Street (the " dipper ") . She said that on the MDP the designation of the east side of

Water Street (which was changed in the MPS to Industrial) was Residential. Ms. Stewart said that since 1978 there has been " wharf development and [sea] infilling ". In drafting the MPS Council made " a conscious move to designate that bit to indicate that industrial expansion out on that side of Water Street [was suitable] for the possibility of infilling and wharf development." On the MPS Future Generalized Land Use Map lot lines were followed in designations while the MDP Future Generalized Land Use Map tended to follow more freehand drawn designation boundaries. In the MPS Future Generalized Land Use Map roadways don't appear to fall within any of the expressed land use designations while under the MDP Future Generalized Land Use Map roadways appeared to be designated in one land use designation or another. Ms. Stewart says this change was made because it was easier to draw as a graphic technique. " Where new designations met - and that was the generalized boundary - the broad brush definition of the limit of the generalized area ...[roads] none of them are designated... they define where the two designations meet..." . Thus the use of thick black lines was avoided on the MPS Future Generalized Land Use Map.

Ms. Stewart started her work on the MPS in September 1984 and the Minister signed it into effect in October 1986. There had been 1 1/2 - 2 years work done on the MPS prior to her involvement in its preparation.

Over these 2 years Ms. Stewart became " quite familiar " with the geographic layout of the Town , the economics of the Town and generally with all aspects of the Town related to the planning of the Town.

In changing the MPS , Ms. Stewart also dealt with changes to the LUB which , according to Ms. Stewart , " had to " be prepared for Ministerial approval along with the MPS changes .

Ms. Stewart recounted the Town's history , geography and economic base much as is set out in the MPS and as is recounted in the evidence of Mr. Chymist.

Ms. Stewart said , because of the slow economic development of the Town since 1978 , the zoning and designation required was done with little regard to prezoning but with regard mainly to existing uses.

In the MPS there is a fairly clear definition between "Policies" and [other]" text". Ms. Stewart felt the text was in the MPS to explain the rationale of the Policies and to address the problems the PAC saw that they wanted the planners to understand .

Ms. Stewart then mentioned the areas outside the M-1 zone of the central core which were zoned M-1 but designated Residential on the MPS Generalized Future Land Use Map. She agrees that this designation prevents the expansion of those M-1 zoned areas without a supporting change in the MPS. There was an intention of the drafters of the MPS not to make these particular zones non-conforming uses. At the same time , the PAC did not want to create other focal nodes of industrial development. Industrial development was to be concentrated in one main central core in the Water Street area on the west side of the harbour capable of lateral expansion (and that lateral expansion being itself quite limited to adjacent lots) with the other industrial zones being incapable of lateral expansion. The smaller industrial zones referred to had , in the words of Ms. Stewart , " no flexiblity clause."

Ms. Stewart said the PAC intended that increase in Industrial zoning would only be one " tier " deep around the main M-1 core on Water Street . The Town did not want Industrial zoning possible three lots away from that area , nor a block away. Industrial zone lateral expansion was to be constrained by the MPS to the immediate tier of lots surrounding the main M-1 core.

Ms. Stewart said that Industrial Policy 5 allows for the expansion of the M-1 zone to those areas adjacent to the industrially designated area. She contends that the Council shall have regard to the proposal before it rather than to the proposed rezoning itself. This would preclude Council , in considering a rezoning application such as the present rezoning application , from considering " the worst case scenario " that might result from the proposed rezoning.

Ms. Stewart holds the opinion that the MPS makes no allowance for the use of development agreements for industrial uses anywhere in the Town. She further is of the opinion that that the proposed development here is for industrial uses and the proposal can only be accomodated within the intent of the MPS by the rezoning device which Council used.

Ms. Stewart , in her evidence and from her perspective , agreed in essence with the procedural chronology of the rezoning described by Mr. Chymist.

Ms. Stewart prepared a report for PAC (a portion of Exhibit B-17) prior to her attendance at Lockeport for the PAC meeting which considered the rezoning. In that draft report there are several lacunae concerning the proposal . There is no indication of knowledge of the area of the property. The ground coverage of the building proposed to be constructed was apparently unknown.

Under the part 1 of this report "THE PROPOSAL" is this statement " opposite the property along Water Street are industrial lands associated with Pierce Fisheries."

Ms. Stewart said as to the designation of Industrial opposite the subject land on South Street on the MPS Generalized Future Land Use Map " on the east side of Water Street is Industrial General... Well as long as there is a foot or two feet we have designated that on the map. If it is designated on the map there is land there , even if there is just a little bit . " [For reasons stated later the tone of voice of this witness on this answer was recalled by the Board and listened to several times on the tapes of the hearing by the Board] . She went on to say that if the boundary line between zones were drawn on the MPS Generalized Future Land Use Map " the boundary would go right down the middle of the street. " In considering this present application , Ms. Stewart held the opinion that the boundary line between the Residential and Industrial designations ran "right down the middle of the street." At this point in her evidence she did not specify which street.

Ms. Stewart said the Zoning By-law specified that the zone " extends out into the street " and the boundary line " between the M-1 zone and the R-1 zone is in the middle of the street."

Ms. Stewart holds the opinion that zoning has to be precise with zoning maps capable of being scaled and definitions have to be put into the Zoning By-law to resolve any ambiguity as to zone boundaries while Generalized Future Land designations are less precise as being only indicators.

Ms. Stewart , holds the opinion that the subject lands are " opposite " M-1 zoned and designated lands and thus Council is permitted to rezone the subject lands to M-1 under what she calls the " general flexiblity clause " of the MPS. In her opinion , the subject lands are "adjacent" .

Ms. Stewart says this about the proposed rezoning infringing upon the residential neighbourhood in which it is located:

" The lot in question is more on the fringe of the residential area on Church and John Street. It fronts onto Water Street which is a heavily travelled - a lot of Industrial activity going on there and it's not part of really the James street or Crest Street residential area. It's on the periphery . It doesn't front onto other residential property. It fronts onto the harbour and to the industrial uses on Water Street. There is traffic industrial traffic to the east end of South Street - there is industrial traffic on Water Street.I didn't feel they would be substantially infringed upon."

Ms. Stewart was also of the opinion that the other requirements for rezoning contained in the MPS were addressed and that there were no nuisance or other factors militating against the approval of the rezoning.

Ms. Stewart , having prepared the MPS , having prepared the present rezoning application for presentation to the PAC the public and Council , and having heard all the evidence preceeding her at this hearing (which included the evidence-in-chief of the Appellant) , holds the firm opinion that the proposed rezoning meets the intent of the MPS.

Ms. Stewart commented on the water problem of the Town as it related to the subject lot. She noted there was a dug well on the lot which had previously serviced a residential mobile home and before that probably the residents in the large old house which had formerly been located on the lot . Ms. Stewart felt that this answered any questions as to freshwater service of the subject lot . She felt that the overall freshwater supply problem facing the Town in general would not be affected one way or another by the present proposal and would continue to exist whether or not this proposal went forward.

Ms. Stewart said there had been " an interesting old building " on the site at the time of the Council's decision but it had not been designated as a heritage building under the MPS (The Town has not enacted a Heritage By-law .) and therefore the nature of the residential building , which has been removed from the site since the Council's decision , could not become a factor for the Council to consider when considering the rezoning of the subject property.

Ms. Stewart dealt with the blanks in the first page of her draft report alluded to above by commenting " I had the information from the letter [from the Applicant] . I didn't know whether there would be a plot plan ... at the PAC meeting . In case there had been any changes I left it blank. ... At the PAC meeting we just had the information that was in the letter...16' high and 30' x 40'... ". By the time the proposal came to Council , the square footage of the building proposed had expanded to 2400 sq. feet.

Ms. Stewart said that the ability to rezone industrial could not go across the harbour since the water served as " a natural barrier . ... there is no zoning on the water."

Ms. Stewart reiterated that , in her view , "adjacent " and " immediately adjacent " were synonomous and that the intent of the MPS was to allow industrial spread only one tier deep around the industrial core. Her view is that the subject property is immediately adjacent to the industrial zoned and designated area and thus was eligible to be rezoned by Council within the intent of the MPS.

Ms. Stewart has the opinion that the MPS has no policy inhibiting the spread of industrial expansion south of South Street.

Mr. Ledrew , only , cross-examined Ms. Stewart. Ms. Stewart said there " is no way of knowing " whether the well intended to be used by the proposal on the subject land will be satisfactory for its intended use or whether its use will affect the surrounding residences which also use wells filling from the same watertable.

On examination by the Board , Ms. Stewart said she had not studied the federal regulations as they might affect this particular proposal but the she had discussed the federal presence as it related to the changes made in the MPD to arrive at the MPS.

On re-examination , Ms. Stewart was referred to Exhibit B-34 , an extract from an assessment map which purports to show Locke's Island . This map was " corrected " to 1981 and showed land approximating the subject land as property # 224 and the " land " to the east side of Water Street and to the north side of South Street (the " dipper ") as property # 405-1. The scale shown on this assessment map is " 1" = 110± ."

Now that the Board has summarized the evidence adduced at the hearing , has listed or made reference to much of the applicable portions of the Planning Act , the MDP , the MPS , and the LUB , and has found the Appellant to be an aggrieved person under the Planning Act , it must now square away to its duty to determine the relevant facts from the evidence and to scrutinize those facts in the light of the applicable law (See S. 32 (2) of the Municipal Board Act) to determine whether or not the decision of Council reasonably carries out the intent of the MPS (See S.63 (3) of the Planning Act).

Logically , in pursuit of of its stated duty , the Board should first proceed to determine the intent of the MPS. Having determined that intent , it should then proceed to test the decision of Council (not the proposal) against that intent.

In order to determine the intent of the MPS it seems logical to this Board that it has the duty to determine , at least for the purposes of this appeal , whether or not the province had any power to delegate to the Town the power to zone the foreshore of Lockeport Harbour as the Town purported to do. Mr. Larkin most strongly argued that the passage of the MPS and the subsequent ministerial approval of the MPS was a full answer as far as the Board was concerned and although a remedy for the Town / Minister acting in an excess of jurisdiction would lie elsewhere it did not reside in the Board . In short , the Board was bound not to enquire beyond ministerial approval. The Board agrees that it has no jurisdiction to remedy any situation in which the Town /Minister has acted in excess of their jurisdiction. The Board does hold the opinion that it has full jurisdiction to inquire into the intent of the MPS. In so enquiring the Board may determine from the facts and law before it that , in fact , in some material aspect alleged by one of the parties all or part of the MPS does not exist in law. That portion that does not exist can obviously not have the intent it purports to have and therefore the Board can use this finding of lack of intent when making its statutory comparisons of the LUB amendment in question with the MPS. To the extent and for the limited purposes here explained the Board holds the opinion that it has both the right and the duty to make the inquiries into who has legislative jurisdiction over the foreshore in order to determine the intent of the MPS as to whether or not the " dipper " can be zoned and designated industrial within the intent of the MPS as , in fact , it was.

Mr. Larkin in his post hearing memorandum starting at page 68 advances this position as how the Board must determine the intent of the MPS:

> " ... the validity of that designation has been brought into question . In particular , it has been sugggested there is no land in that location [the " dipper "], so the designation must fail , as must the rezoning application.
>
> This raises the following questions:
>
> (1) What is the jurisdiction of the Board to look behind the Municipal Planning Strategy?
>
> (2) If the Board has jurisdiction to look behind the strategy , is the disputed designation on the Generalized Future Land Use Map valid ?
>
> This may require a determination of whether there is , in fact , an area of land in the location in question [the " dipper "] and whether that land may be the subject of designation."

Mr. Hood argues on this point , in his post hearing memorandum , (after first alleging as a matter of fact that there is land in the " dipper " sufficent to sustain an Industrial Designation in the MPS) on page 13:

> " It is further stated that the question of whether or not there is land , or whether or not the land is owned by the Government of Canada , or the Province in its own right , is irelevant [sic] for these proceedings by virtue of the fact that the jurisdiction of this Board is confined to dealing with the plan as approved by the Minister of Municipal Affairs. There must be a presumption that approval of the plan was preceeded by all normal requirements of the Planning Act prior to that approval being granted. There is no evidence to the contrary. "

Mr. Ledrew , contra , attacks this problem on two levels starting at p 18 of his post hearing memorandum . He correctly states that the Board's jurisdiction is to determine whether the intent of the Town's MPS has been reasonably carried out by Council. He then goes on to state that the second goal of the MPS is to encourage the orderly development " ... of lands within the the Town ... " and then he goes on to allege , as near as the Board can understand , a) that there are no lands in the " dipper " at any place relevant to this rezoning and therefore there can no industrial designation to "infect " the adjacent residential zone pursuant to the general flexibility clause of the MPS and/or

b) that the area of the " dipper " is not within the Town and is therefore incapable of being rezoned by the Town.

c) that the area of the " dipper " may be within the Town but that it is not land within the Town and for that reason alone cannot be included in the MPS [see a) supra]

All the maps appended to the MPS and the LUB which indicate a Town boundary indicate that boundary encloses the Mainland portion of the Tcwn , Locke's Island , a whole flock of other very small nearby islands and the sea around them . Included in that area is the " dipper " [whether land or not]. The best evidence the Board has before it is that the " dipper " falls within the boundary of the Town. If that is correct , b) argument of Mr. Ledrew must fail.

In order to succeed on argument a) alone , Mr. Ledrew must:

1. Prove there is no land in the " dipper " opposite the subject land on the north boundary of South Street designated Industrial.
2. Satisfy the Board that "adjacent " in the general flexibilty clause of the MPS means " immediately adjacent "
3. Establish on authorities the power and jurisdiction of this Board to make a determination that the maps being a part of the MPS designating the " dipper " as Industrial are in error which error the Board can identify and can act upon while engaged in the determination of this appeal
4. If the authorities establish that the Board has the jurisdiction mentioned in paragraph 3. supra , prove the " dipper " is located in the harbour of Lockeport designated as such under the relevant federal or Imperial legislation.

5. Establish on the authorities that the Province in such circumstances itself has no power to legislate on lands covered with water at any point below high water mark and thus , in the words in Mr. Larkin's memorandum , " there is no land in that location [the " dipper "], so the designation must fail , as must the rezoning application. "

If Mr. Ledrew were to suceed in 1-5 supra inclusive the other planning matters going to the intent of the MPS and Council's decision's reasonable carrying out of that intent might become moot since there would be no grounds for Council in any event to consider the flexibility clause of the MPS in relation to this application to rezone since there would be no industrially zoned and designated lands adjacent to the residential land proposed to be rezoned to industrial.

The Board uses the phrase " might be moot " since Mr. Larkin advocates a meaning of the word "adjacent " which would allow the clearly "legal" M-1 area of land situate just north of the " dipper " and on both sides of Water Street to be "adjacent to " the subject property and thus capable of forming a legitimate basis for the Council's decision to exercise its powers to rezone under the flexibility clause of the MPS. In support of his contention that the Board so interpret " adjacent " in the MPS , Mr. Larkin cited Blacks'Law Dictionary (5 th edition) , the following court authorities and also some prior decisions of this Board. They are as follows:

Mayor of Wellington v. Mayor of Lower Hutt (1904) A.C.773 {1}

Re Van Vlasselear et al and County of Elgin Land Division Committee et al.(1977) 16 O.R. (2d) 762 {2}

Heritage Motors Limited v. City of Dartmouth NSMB-514-86-P {3}

Nauss Brothers Limited v. Town of Bridgewater (1983) 2 MBD 639 {4}

The Board to deal with this primary (or "determinate") argument will have first to find whether the facts needed as a basis for this primary argument exist.

Having listened with great care to the testimony of the Appellant's witnesses and with greater care to the remarks of Ms. Stewart and having visited the site in the company of Mr. Chymist (inter alia) the Board is satisfied that there is no land above mean high tide mark outside the streets in the " dipper " area in an area opposite South Street from the subject land which could give rise to the Council's use of the flexibility clause of the MPS in rezoning the subject land to M-1 . This finding is supported by other evidence as well. The differences between the MDP and the MPS in their different treatment of the wharves and the " dipper " help to indicate the fact that there is no land in the " dipper " above mean high water mark. The survey plan , Exhibit B-32 , shows that South Street's north boundary is a straight line in the area where it must abutt the " dipper " . Given the straight line north boundary of South Street

, the assessment map Exhibit B-34 used by Ms Stewart in determining the the nature of the land in the area for the purposes of preparing the MPS and LUB (when looked at in detail) shows no land in the " dipper " on the north boundary of South Street opposite the subject lands. This can be discerned by taking a straight edge and applying it to a point on the north boundary of South Street shown on that plan at its intersection with the west side line of Water Street and laying it along the next straight portion of the north boundary of South Street shown on the same plan. By the analysis of the evidence concerning the existence of land above high tide level as defined above , The Board determines there isn't any in the " dipper " outside the road boundaries .

It is amply clear however that the land slopes from the edge of the road to low tide mark and beyond and between high and low tide in the area of the " dipper " there is a continuous strip of land showing at mean low tide at least 25' in width.

Dealing with point 1 on the evidentiary legal burdens the Board has said fall to Mr. Ledrew if he wishes to succeed in his "determinate argument" the present answer is a decided "maybe" at this point of the writing of this decision. There is no land above high water mark in the " dipper " . There is land between high water mark and low water mark in the " dipper " . The " dipper " area is within the Town on the best evidence before the Board (which takes care of Mr. Ledrew's b) argument) .

Dealing with point 2 on the evidentiary and legal burdens the Board has said fall to Mr. Ledrew if he wishes to succeed in his "determinate argument", The Board is satisfied that in these circumstances of this appeal , namely the context of the MPS before it , the flexibility clause it is interpreting , the "ambience " (or environment or whatever you may call it) of the Town (all of which have been set out in some detail above) "adjacent " means " immediately adjacent " and the interzonal boundaries are as defined in the LUB. The Board finds comfort and guidance in this finding from this statement in Mayor of Wellington {1} case at page 775

> "Adjacent " is not a word to which a precise and uniform meaning is attached by ordinary usage... What degree of proximity would justify the application of the word is entirely a question of circumstances. "

The circumstances proven in this appeal require the Board to determine that " adjacent " means " immediately adjacent."

Thus the designation and zoning of the " dipper " must be found to have been done in a legally effective manner to allow Council to rezone the subject lands as it has done.

Dealing with points 3 , 4 and 5 on the evidentiary and legal burdens the Board has said fall to Mr. Ledrew if he wishes to succeed in his " determinate argument ", Mr.Ledrew has proven that the area of the " dipper " probably lies within the area designated under the federal OIC as "Lockeport Harbour." He would have us to believe that such designation took the area out of any provincial jurisdiction there may have been over the area in question and put it into the realm of exclusive federal jurisdiction thereby prohibiting the province from regulating the area in any manner in general and , for the purposes of this appeal , in any manner under the provisions of the Planning Act in particular. The Board has invited Mr. Ledrew to demonstrate statutory , or any other , authority , confirming his view that the OIC harbour designation of Lockeport Harbour has that effect of removing the area of the " dipper " from the jurisdiction of the province or even from the category of being land within the Town.

He has been unable or unwillinging (and finally said he did not wish to pursue the matter any further that he had raised) to adduce authorities that indicate the harbour designation has that effect.

Athough Mr. Ledrew eventually withdrew his client's support of the federal jurisdiction argument , the Board , because the argument went to the jurisdiction of the Province to legislate in the area of the " dipper ", decided , as announced in its last letter to Mr. Ledrew , to try to decide this issue on such authorities as were before it or upon such authorities as it could find on its own. If Mr. Ledrew had been correct in his argument the sucess of the argument would have decided all the issues before the Board.

Schedule C to this decision contains the results of the Board's efforts under the mandate of its last letter to Mr. Ledrew.

Mr. Larkin wishes the Board to find in this case that there was at least a concurrent jurisdiction in the Province in enacting the Planning Act and thus the Town in enacting its MPS to permit the Town to designate the " dipper " "Industrial" and to so zone it. If there is such concurrent jurisdiction , and if the federal actions to date have not preempted the provincial right to legislate , then the intention of the MPS is quite patent as to its LUB.

There is no evidence before the Board , except the Federal OIC making Lockeport Harbour a harbour in 1881 , to indicate the degree of control exercised by the Federal Government over Lockeport Harbour , its foreshore , or the land under its water . There is no evidence of fact (or evidence of any law cited to the Board not previously alluded to elsewhere in this decision) before the Board indicating that the federal Crown has entered the land use regulation field in respect to that portion of Lockeport Harbour the Board has found constitutes the " dipper " . With the possible exception of the OIC , there is no evidence to indicate the ownership of the land daily covered from time to with water in the " dipper " . Lockeport Harbour (like all other harbours) does not appear in schedule III of the B.N.A. Act (now the Constitution Act) as of 1867 and there is no evidence before the Board sufficent to convince the Board that it should have been included in that schedule. Based on the representations and evidence before it , the Board , perhaps in ignorance of the law , does not know of any federal control over Lockeport Harbour except as may be done under the the type of statutes cited in Hamilton Harbour Commissioners {8}.

The Board has read and tried to understand all of the above authorities as well as those others listed in Schedule A. Holman v. Green is very definite in its statement and is made by a very high court early in its career . It has been often followed in Nova Scotia in older days and most recently it has been favourably cited in Quebec. A full reading of the Privy Council decisions seems to the Board to dispose of the extreme position and (in the view of others as well as this Board) unnecessary position taken in Holman v. Green and thus the view expressed in the Hamiton Harbour Commissioners {8} supports the reasoning set out in those in the line of cases cited above which derogate from the clear but incorrect position set out on Holman v. Green{9}

In any event the burden is on the appellant to prove that , at the time of Confederation , Lockeport Harbour was a public harbour and that the foreshore at the " dipper " was used for harbour purposes. There is some evidence that Lockeport Harbour was a public harbour (see the historical section of the MPS) and some evidence that it was not (see the 1881 OIC designating it a harbour) so the appellant has not met her burden of proving to a balance of probabilities that at the time of Confederation the harbour became the property of the Dominion by virtue of schedule III of section 108 of theB.N.A. Act . There is no evidence to show that the foreshore of Lockeport Harbour at the " dipper " was ever used for harbour purposes so even if Lockeport Harbour became a federal public harbour at Confederation , the dippper , on the evidence before the Board , unused for harbour purposes as it apparently was , never left the ownership it had immediately before the instant of Confederation . At that time it could only be provincial property (owned outright by the provincial [colonial] crown or some prior grantee holding from that Crown. [There was absolutely no evidence or indication before the Board that the " dipper " immediately prior to Confederation was in the ownership of the Imperial Crown and the Board thinks that to be so improbable as to exclude the possibility] . There is no indication before the Board that the federal government , under its various powers over navigation , shipping , and so on under the Constitution Act nee' the B.N.A. Act has acted , or perhaps can even act , to intrude on the field of land use planning in the foreshore of Lockeport Harbour. At the very least therefore the land of the foreshore of Lockeport Harbour in the area of the " dipper " remains a part of the land of the province of Nova Scotia and is capable of being zoned and being designated by the Town which obtains its jurisdiction to do so from the

Planning Act passed by the legislature of Nova Scotia. Perhaps the Federal Government might encroach on this jurisdiction if it chose to do so but there is no indication before this Board that this is the case to date .

The Board therefore finds that the Town's zoning and designation of the " dipper " as Industrial does in fact exist and such designation forms part of the intent of the MPS , that such designation reaches to the center of South Street where it meets the Residential zoning and designation of the subject lands reaching north across South Street. Mr. Ledrew's "determinate argument" thus cannot succeed and the Board finds that Council had the power to make the decision to rezone as it did since it was entitled to consider rezoning the subject lands Industrial since they were residentially zoned lands in a designated residential area immediately adjacent to industrially zoned lands in an industrially zoned area.

The question still remains " Does the decision of council complained of reasonably meet the intent of the MPS? "

The main valid objection of the Appellant to the rezoning is the " worst possible use scenario " put into a residential area. The appellant's next most valid objection in the view of the Board is the violation of her concept that the MPS intended that there be no additional Industrial use permitted to the south of South Street. Another possible defect in the rezoning is that the land rezoned has uncertain and indefinite boundaries and as such cannot be a valid rezoning. A defect in the zoning may be that the text of the zoning change instrument extends the M-1 zone by rezoning more than one " tier " of lots from its base of Industrial designation.

The Town's strongest point is that the proposal put before Council and regularly approved by Council was acceptable , if built and used as proposed , to most everybody including some of the people who testified for the appellant at the hearing. Its next strongest point is that it heard and considered all the valid arguments against the rezoning , and after giving them its fullest consideration voted for the rezoning. The Council was satisfied that the developer would build his project as proposed. The MPS noted the need for industrial development in the Town . The size of this project in the scale of Lockeport is important either as job maker or as a job preserver.

The two preceeding paragraphs contain the issues the Board believes to be important in determining whether the decision of Council complained of reasonably meets the intent of the MPS. Some implied support for Mrs. Benham's position that the intent of the MPS is that there be no futher Industrial development south of South Street may be found in the provisions that prohibit the extension of Industrial zones that are now located , or may become located , south of South Street. This , however is common to all the zones that surround the Industrial core of the Town and is not peculiar to the area south of South Street so that the Board is of the opinion that that argument fails and there is no such intent in the plan of the strength necessary to stop the present rezoning.

The Board is concerned that the worst case scenario which results from the decision complained of would be an unwarranted intrusion into the residential neighbourhood which might contravene the intent of the MPS . Council faced that issue and decided in favour of the developer. The Board has heard the developer and seen his "illegal" footings in the ground so it is clear to the Board that he intends to build what he has proposed. What he has proposed , in the opinion of the Board , would not be an unwarranted intrusion into the the surrounding residential neighbourhood. The intent of the MPS for industrial development is an imperative for Lockeport and , in this appeal , in the view of the Board , is a very persuasive indication of MPS intent if not , indeed , a determinant.

Having considered all the evidence the Board is unable to say , on balance , that the intent of the decision of Council [i.e. to rezone the Pierce Fisheries land south of South Street] does not reasonably carry out the intent of the MPS of the Town for all the reasons set out above , but it finds that the decision of Council complained of herein as doumented in evidence as to its text does not comply with the intent of the MPS.

That decision was carried out , however , with an unacceptable lack of precision in the result. The intent of the rezoning decision was to rezone the area owned by the Applicant with certain minor derogations from the grant. The present handling of that decision does not , on the evidence adduced before the Board , achieve that result in at least two aspects which derogate from the precision of definition necessary in a zoning:

1. The diagrams used in both the pre-hearing and post-decision advertising (and which are incorporated by reference into the amendment to the LUB or , at least , are held out by the Town to be part of the amendment to the LUB) encompass land other than that owned by the Applicant and this is contrary to the intent of the motion by which Council passed the LUB .

2. The Applicant yielded an indefinite amount of its land to aid the title of an encroacher and it is uncertain whether Council made any allowance for this diminishment of the Applicant's ownership of its property.

The Board agrees with Ms. Stewart's sworn opinion that precision in the definition of zonal boundaries is a desirable attribute to all zoning or rezoning made within the context of an MPS.

In any event the instrumentality embodying the amendment of the LUB , as it was presented to this Board , takes in more land than is encompassed in the one " tier " of lots that the MPS allows to be rezoned to M-1 in these circumstances and thus the rezoning decision , as it exists in that instrumentality , is clearly contrary to the intent of the MPS.

The document before the Board that properly depicts the Applicant's land with those two adjustments made is the plan previously described as Exhibit B-32. The rezoning should encompass by appropriate description or reference the lands shown on that plan as "lands of Pierce Fisheries Limited... area 40,215 sq.ft." This lot is the lot intended to be rezoned by the decision of Council and must be embodied in any rezoning resolution which conforms reasonably to the intent of the MPS. The LUB By-law amendment as passed must be amended to attain the necessary boundary precision appropriate to proper rezoning .

Unless and until this lack of precision (which violates Implementation Policy 11 xii " any other relevant matters of planning concern ") , AND the reduction to one " tier " of M-1 expansion the admitted-by-all-witnesses statement that the MPS permits only one lot " tier " of M-1 zonal expansion from the industrially designated base , the decision of Council as embodied in its text does not reasonably meet the intent of the MPS.

In such circumstances what can the Board do , if anything , to preserve the true intent of Council ? The present Planning Act (quoted in detail supra) combines in its s.64 both the appeals from decisions to amend the LUB and from decisions to refuse to amend the LUB. Because of the word "or" at the very last part of s.63 (4) (b) , it has been said that the Board has two conclusions to be used when dealing with an appeal from a decision amending a LUB namely s.64 (a) confirmation of the positive decision to rezone or (b) reversal of the positive decision to rezone and that s. 63 (c) was only available to the Board when the appeal was from a decision refusing to amend the LUB. The previous Planning Act had the Board's appeal powers split into two sections in the Act , one for positive decisions to rezone and one for refusal decisions. Under its s. 38 (4) the appeal from a positive decision to amend the Zoning By-law was dealt with separately from the decision to refuse in its s.39 (4) . S. 39 (4) (b) had much the same wording as is now contained in the present s. 64 (4) (b) of the Planning Act. It is to be noted under its s. 38 (4) (b) , the Board , even under the former Planning Act , could make variations in the land area to be covered in the rezoning , even after a positive decison of Council. The Board after a study of this position holds the opinion that it cannot put that interpretation of s.64 (4) of the Planning Act. The Board is of the opinion that s. 63 (4) (c) is available to it as an option when considering the appeal from a positive decision of a Council amending a LUB.

Having said all that , the Board notes that it should exercise supreme caution when allowing an appeal under S. 63 (4) (c) of the Planning Actof a Council's positive decision to rezone. A straight confirmation of a council decision or a straight rejection decision of a council's decision should ordinarily be easier to identify than a decision under said s.63 (4) (c) which , at least in one of its aspects , almost amounts to an amendment of the council's positive decision. In this case the intent of Council is clear , to rezone the Pierce Fisheries lotfully within the intent of the MPS . The error in the instrumentality in which this decision exists is equally clear , and clearly in violation of the intent of the MPS. The correct content to insert into the instrumentality so that it will fulfill the clear intent of Council has been produced in evidence in a readily usable form so that the Board may safely correct the error without risking another worse error through its possible lesser knowledge of local conditions that may affect by-law content which knowledge , ordinarily , would normally fall within the particular skills of the local council.

With this caution in mind , the Board further holds that this appeal is a proper case in which to invoke the relief it can offer in the circumstances .

Thus pursuant to section 63 (4) (c) of the Planning Act the Board allows the appeal from the decision of Council complained of by instructing the Council to amend the By-law in the manner prescribed by the Board viz The rezoning should encompass by appropriate description or reference the lands shown on that plan [Exhibit B-32] as "lands of Pierce Fisheries Limited... area 40,215 sq.ft." .

The Board notes that pursuant to s.63 (8) Of the Planning Act the amendment to the LUB ordered by this decision is not appealable to the Board and therefore the legislation contemplates an uninterupted imposition of the Board ordered amendment which legislative intent will be served by the order which will issue following this decision.

Pursuant to s 29 of the Municipal Board Act an order allowing the appeal and instructing the Council to amend the by-law in the manner prescribed by the Board will issue.

Dated at Halifax , Nova Scotia , this 28 day of July , 1987

RICHARD L. WELDON

MEMBER

SCHEDULE A

Mayor of Wellington v. Mayor of Lower Hutt (1904) A.C.773 {1}

Re Van Vlasselear et al and County of Elgin Land Division Committee et al.(1977) 16 O.R. (2d) 762 {2}

Heritage Motors Limited v. City of Dartmouth NSMB-514-86-P {3}

Nauss Brothers Limited v. Town of Bridgewater (1983) 2 MBD 639 {4}

Young v.Harnish 37 N.S.R. 213 {5}

Fader v. Smith 18 N.S.R. 433 {6}

Sword v. The Sydney & Louisburg Railway Co. 23 N.S.R. 214 {7}

Hamilton Harbour Commissioners v. City of Hamilton et al. 91 D.L.R.(3rd) 353 {8}

Holman v.Green (1881) 7 S.C.R.707 {9}

Le Procurer General De La Province De Quebec c. Edouard Healey [1979] C.S. 286 {10}

Kennelly v. The Dominion Coal Co., Ltd. et al (1904) N.S.R. 495 {11}

Charles Anderson v. His Majesty the King and M.A. Nickerson (1919) 59 S.C.R. 379 {12}

Edward Maxwell v. His Majesty the King (1917) 17 Ex.C.R.97{13}

Zwicker v. La Have Steamship Company (1911) 9 E.L.R. 114 {14}

The Sisters of Charity v. His Majesty the King (1919) 18 Ex. C.R.385 {15}

The Attorney-General for the Province of British Columbia ex rel the City of Vancouver v. the Canadian Pacific Railway (1904) 11 B.C.R.289 {16}

The Attorney General of Canada v. Western Higbie and Albion Investments Ltd. and the Attorney General for British Columbia [1945] S.C.R. 385 {17}

The King v. Jalbert et al [1938] 1 D.L.R. 721 [18]

Attorney-General of Canada v. Attorneys-General of Ontario , Quebec and Nova Scotia [1898] A.C.700 {19}

The Attorney-General of British Columbia v. The Attorney -General of Canada (1889) 14 A.C.295 {20}

The Western Counties Railway Company v. The Windsor and Annapolis Railway Company (1882) 7 A.C. 178 {21}

City of Montreal v. Harbour Commissioners of Montreal et al [1926] A.C.299 {22}

Tobias et al v. Nolan 71 N.S.R.(2nd) 92{23}

Tobias et al v. Nolan S.C.A. No.01615 {24}

The Meaning of "Public Harbours" in the Third Schedule to the British North America Act , 1867 41 C.B.R. 519 {25}

B.C. Development Corporation v. Friedmann (Ombudsman) [1984] 2 S.C.R. 447{26}

Riverlake Residents Association v Municipality of the County of Halifax (1985) M.B.D.(Volume Four-B) 122 {27}

Woodworth and Schwartz v The Disrtict of East Hants NSMB-515-86-P {28}

Gertrude S. Finlayson v. The Town of Sydney Mines NSMB-559-86-P {29}.

Backman v.City of Halifax NSMB-562-86-P {30}

Reference Re Mineral and other Natural Resources of the Continental Shelf(1983) 41 Nfld.& P.E.I. R. 271 {31}

Re Attorney-General of Canada and Attorney -General of British Columbia et al (1984) 8 D.L.R. 161 {32}

Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland (1984) 5 D.L.R. 385 {33}

SCHEDULE B

EXCERPTS FROM THE TOWN'S MPS

AND

FROM THE TOWN'S LUB

"1. INTRODUCTION

1.1 Preamble

... This document and its accompanying maps replaces the 1977 MPS.

1.2 Purpose

... In particular this ' second generation ' plan reflects Council's greater awareness and understanding of the planning process and how it influences development. Council has not only strived [sic] to simplify the MPS and its accompanying LUB but it has also tried to make these documents easier to understand.
A MPS does not stand alone. It contains policies which are primarily implemented through the Land Use By-Law. In addition , in accordance with the Planning Act (Section 45) , Council cannot undertake development contrary to the stated policies of the MPS.

1.3 Planning Process

... The members of the Committee were motivated by a strong desire to simplify the planning process and to make it more understandable. ...

1.5 Goals

...

-to protect and enhance natural and man-made environments ;
-to encourage the orderly development and redevelopment of lands within the Town without compromising the integrity of the existing residential areas ;
-to promote the continued improvements of the fishing industry in a manner beneficial to the Town and and its residents ;
-to encourage economic diversification by promoting ... ocean related industries that would be in the best interests of the Town ;

...

2. THE BACKGROUND

2.1 Setting

...incorporated in 1907...first settled in 1755 ...Lockeport is a fishing community and historically its prosperity has been linked to the fishing industry. Present day fishing activities are focused on Locke's Island around the harbour and the two main fish processing plants. ... Locke's Island contains the bulk of the Town's development and thus its dwellings , schools , churches and shops. A well developed narrow grid-street pattern with small lots characterizes the northern half of the island. The southern half in contrast is less densely developed , the land being slightly hilly and rocky with several low lying areas. ...

2.2 Population

Lockeport is a small town. In 1981 the population was 929 ...[in] 1976...1,020 ...population projections for the Town indicate a steady move toward the population stabilizing around 900 by the year 1991. ... there are fewer people under the age of 21 and more over the age of 64. ... households are getting smaller. ... In general terms , children have grown up and left home and couples are having fewer children. ...

2.3 Development Trends

2.3.1 Housing

... three dwellings per year ... less than an acre per year based on a minimum lot size of 10,000 square feet.
The quality of the housing stock is good.
...

2.3.2 Commercial and Industrial Trends

... commercial businesses in the Town has [sic] continued to decline...
In 1980, the National Sea fish processing plant was destroyed by fire. It was replaced by a larger plant ... employs about 325 people. Pierce Fisheries operates the other main plant and handles scallops and ground fish. Several smaller plants operate along the wharf. ...

2.3.3 Other Major Events

Since the adoption of the Town's first plan ...a centralized sewer system , a fresh water system for the fish plants , a new sports field , a tourist hut , a new library , and renovations to the museum ... the railway line was abandoned and the tracks removed.... the Town is no longer responsible for providing educational services but it still has a financial commitment.

3 PLANNING STRATEGIES

3.1 Introduction

The MPS policies in this chapter establish ... Generalized Future Land Use Classifications: Residential General , ... Industrial , ... the Generalized Future Land Use ... Map is very important as it indicates Council's intentions with respect to the desired future general distribution of land uses within the Town. ...
zones are to be established in the LUB... Residential General (R-1) , ... Industrial General (M-1) ...

the policies also allow Council to consider certain types of development by development agreement as set out in Section 55 of the Planning Act....
The circumstances under which a development proposal shall be considered by Council by a development agreement are:
(i) for office and commercial uses...in areas designated Residential General on the Generalized Future Land Use Map ; see Residential Policies.
...
The plan's concluding chapter Implementation describes how the policies in the MPS will be put into effect.
...
3.2.6 Public Road Frontage
...
General- Policy 8
...all new development abut and front on a public street or provincial highway ...

3.2.8 Signs
...
General - Policy 13- ... establish general requirements in the LUB for signs.

3.3.1 Residential General Designation
There are approximately 305 dwelling units in the Town and 76% are located on Locke's Island. The majority of these are situated north of South Street while a relatively high concentration is located in the southeastern corner of the island. Overall residential development on Locke's Island is compact with a number of small , irregular shaped lots throughout the area. Also of note , are several interior vacant lots , particularly in the southeast quarter. ...
Permitted uses in the ...R-1... will be relatively low density residential uses. ...
Council does acknowledge , however , the recent water shortage problems experienced by residents and consequently shall approach the Department of Environment to discuss with them [sic] the possibility of having a water study conducted to determine... smaller minimum lot size is feasible and prudent.
The intent of this designation is to guide residential development in a manner that preserves the relatively low density and relatively compact characteristics of the community and to minimize the future cost of servicing residential lands within the Town. ...
There are a number of vacant parcels of land in the southern portion of Locke's Island. These too will be designated Residential General on the Generalized Future Land Use Map and zoned ... R-1... .
on Locke's Island there are several dwellings more than 100 feet from a sewer line and consequently have not (by choice) connected to it. (The Town's sewer By-law requires all dwellings within 100 feet of a sewer line to be connected to it.) ...

Lockeport is a fishing community ... Council feels it is only reasonable to allow fishermen to store their fishing gear on their residential properties provided it is done in an orderly manner. ...
the old MPS was amended to allow commercial and office uses in areas designated Residential General on the Generalized Future Land Use Map by development agreement. This policy shall be maintained. ... Council recognized that there was a limited amount of developable vacant land on Locke's Island and most of the land that was available was designated Residential General on the Generalized Future Land Use Map which allowed relatively low density residential type uses. ...
Council did not wish to open up the residential lands by allowing commercial re-zonings but ...in certain instances the development , redevelopment or expansion of commercial and office uses in the Residential General designated areas might be undertaken with due care toward the existing residential uses yet at the same time provide uses that would be beneficial to the long term prosperity and vitality of the Town as a whole. ...

Residential-Policy 1- It shall be the intention of Council to designate the built -up residential areas in the Town , the vacant land on Locke's Island adjacent the residential area... Residential General on the Generalized Future Land Use Map .

Residential-Policy 2-It shall be the intention of Council to zone Residential General designated lands ...R-1... . relatively low density residential type uses ...
...
Residential-Policy 4-It shall be the intention of Council to approach the Department of Environment to discuss the possibility of having a water table study conducted for the Town.

Residential-Policy 5-It shall be the intention of Council , if the results of the water table studies indicate , to change the minimum required lot size for serviced development by amending the Land Use By-law.
...

Residential-Policy 13 -It shall be the intention of Council to consider ... commercial and office uses in the areas designated Residential General on the Generalized Future Land Use Map ... by development agreement...

Residential-Policy 16 -It shall be the intention of Council ... to allow the outdoor storage of fishing gear in an orderly manner on residential properties.
...
Commercial General-Policy 16-It shall be the intention of Council to consider requests to zone properties Commercial

(C-1) in the area designated Commercial General by amendment to the LUB subject to Implementation Policy 11.

...

3.5 Industrial Activity

Lockeport's primary economic function is that of a fishing port. ... Council will deal with the matters it can address to establish a positive climate in which the industry can operate. ... Council acknowledges the need to diversify its economic base to provide new jobs to keep its young people in the Town. ...

Fishing and related activities are centered on Locke's Island along the harbour in the area along Water Street (eg. National Sea and Pierce Brothers) and on the government wharves. These areas shall be designated Industrial on the Generalized Future Land Use Map . This will also include vacant lands owned by Pierce Brothers along Water Street. These lands will subsequently be zoned Industrial General (M-1). In addition ... the existing industrial uses on John Street and South Street shall be zoned...M-1...but designated residential. This will allow these uses to continue but prevent the expansion of industrial activity into adjacent residential lands. The M-1 Zone will allow fish and marine related industrial uses and general industrial uses. Provisions concerning loading spaces , yard requirements , outdoor storage , buffering , parking ,and lot size requirements will be included in the LUB to apply to the expansion ... of new industrial uses. Also lot requirements for development on the Government wharves will be waived.

Council recognizes that with two exceptions existing industrial activities have been designated and subsequently zoned for industrial use. To accomodate future industrial development Council intends to permit industrial development by amendment to the LUB... in lands immediately adjacent the areas designated Industrial on the Generalized Future Land Use Map . These amendments will be subject to a number of criteria concerning the compatibility with adjacent uses , the impact of the proposed development on the natural environment , and to the general criteria Council looks at when amending the LUB (Implementation Policy 11, Page 47.) In addition , on Locke's Island proposed industrial development should be connected to the centralized sewer system for sanitary wastes only.

...

Scrapyards , salvage yards and auto body repair shops (other than at [sic] a service station) will be permitted uses in the ...M-1...zone. These uses will be permitted only by amendment to the by-law in areas designated Residential Large Lot and special provisions will be established in the LUB with respect to these uses.

...

Industrial- Policy 1- It shall be the intention of Council to encourage the expansion and diversification of industry in Lockeport while ensuring that such expansion does not conflict with other land uses.

Industrial- Policy 2- It shall be the intention of Council to designate on Locke's Island the industrial land along Water Street and at the wharves Industrial on the Generalized Future Land Use Map .

Industrial- Policy 3- It shall be the intention of Council to zone the lands designated Industrial on the Generalized Future Land Use Map ...M-1... . This zone shall allow as-of-right fishing and marine related industrial uses and general industrial uses excluding fish reduction plants.

Industrial- Policy 4- It shall be the intention of Council to designate the industrial lands along John and South Streets Residential General but to zone them Industrial General (M-1).

Industrial- Policy 5- It shall be the intention of Council to permit new industrial uses in lands adjacent the areas designated Industrial ... on the Generalized Future Land Use Map by amendment to the LUB provided:

a) that all the applicable criteria of Implementation Policy 11 have been taken into consideration.

b) that the proposed development does not infringe on adjacent residential , institutional or recreational areas or are incompatible by reason of noise , appearance , traffic generated , odour or outdoor storage.

c) that waste products do not have a detrimental impact on the natural environment.

d) that the proposed developments on Locke's Island are connected to the centralized sewer system for sanitary wastes only.

Industrial- Policy 6- It shall be the intention of Council to include provisions in the LUB concerning buffering , parking , outdoor storage , yard requirements , lot size and loading space requirements for industrial activities.

Industrial- Policy 7- It shall be the intention of Council to allow ... auto body repair shops in the area designated Residential Large Lot by amendment to the LUB... .

Industrial- Policy 8- It shall be the intention of Council to set up provisions in the LUB concerning abutting yard requirements and buffering particularly along public road frontages for ... auto body repair shops.

...

3.6 Open Space and Recreational Activity

...

Along the shoreline on Locke's Island between South Street (which extends to the beach) and the salt water pumping station there is a property whose owner is unknown ...

...

3.7 Municipal Services

3.7.1 Sewer and Water

Prior to 1980 ... problems ... sewer and water ...
on site servicing ... caused ground water contamination and sewage pollution in the harbour ... a potentially serious health hazard. ... in 1980 ... the Town installed a complete sanitary sewer system including a sewage treatment plant [with] ... enough capacity to handle any anticipated future demand. ...
all domestic water in Town is supplied through individual wells. ... the freshwater needs of the Town's two fish processing plants are accomodated in 1981... by ...a fresh water transmission line and treatment facilities from a source ... outside the Town Boundary ... . National Sea ... are using the total capacity of the system ...
the two large fish plants are served by ... fresh salt water ...
Domestic water supply is still an issue for the Town . ...

Municipal Services-Policy 1-It shall be the intention of Council to encourage those residents of Locke's Island who are not connected to the centralized sanitary sewer to do so. ...

3.8 Transportation

3.8.1 Road Network

Development of Locke's Island has a ' pedestrian scale ' in that the area appears to be built for pedestrian movement. Everything is within walking distance. This is a historical legacy. It gives Locke's Island .. . a distinct quality. The narrow streets cannot and should not be turned into 66 foot rights-of -way ; ... the Town must operate within the physical constraints and attempt to provide the road network and parking wherever physically and economically possible.

The key issues are parking and truck traffic on Locke's Island.
.... a one way street system does not appear to be feasible given the size of the Town , the volume of traffic involved and the disruption it would create. In this instance the cure is worse than the illness.
Shoppers in Lockeport like to park in front of the shop they plan to visit. ...

Turning to truck traffic the issue of whether or not a truck route should be designated within the Town has been reviewed. Unfortunately there is no main truck route.

Transportation- Policy 4-It shall be the intention of Council to monitor truck traffic and to investigate safe and practical means fo minimizing traffic disruption ... .

...

Transportation- Policy 7-It shall be the intention of Council to investigate the need for more sidewalks in Lockeport.

...

3.8.3 Water Transportation

... Council should establish a policy of continued dialogue with federal authorities to ensure proper maintenance of the harbour and port facilities.

Transportation- Policy 9-It shall be the intention of Council to investigate from time to time the need for harbour dredging and government wharf regulations and to make appropriate representation to the Federal Departments....

3.9 Tourism

...

Tourism- Policy 5-It shall be the intention of Council to investigate the possibility of designating some of the Town's oldest buildings as heritage buildings under the Heritage Property Act.

...

4. Implementation

This section is the most important part of the ... MPS ... .

Implemention- Policy 2-It shall be the intention of Council that all sections of this document , all the appendices and all associated maps shall constitute the ... MPS ... .

4.3 Amending the MPS

...

There is one important situation when a MPS amendment is not required. This is often called the flexibility clause. This concerns the area of land immediately adjacent a given land use designation on the Generalized Future Land Use Map. In this instance , that land may be re-zoned to a zone established for that adjacent land use designation provided the intentiions of all other pertinent MPS policies are adhered to.

...

Implemention- Policy 8-It shall be the intention of Council notwithstanding Implemention- Policy 7 that areas immediately adjacent to a land use designation on the Generalized Future Land Use Map may be considered by amendment to the LUB for a use permitted in the adjacent land use designation without amending the MPS and provided that all other relevant MPS policies are satisfied.

4.5 The Land Use By-law

The LUB is the principal means through which the vast majority of the policies in the MPS are implemented.

...

Implemention- Policy 10-It shall be the intention of Council that the LUB shall be the principal means for implementing the land use policies of the MPS in accordance with the Planning Act.

4.6 Amending the Land Use By-law

There are two types of LUB amendments: text amendments (eg. changes to a definition) ; and , zoning map amendments (eg. rezoning a property from R-1 to R-3 on the zoning map).

...

What is very important is the general criteria Council may have regard to when considering a request to amend the Land Use By-law. (criteria other than that set out in the various policies established so far in this MPS.) All the criteria may not be applicable in every proposed amendment - hence only the applicable criteria should be considered.

Implemention- Policy 11-It shall be the intention of Council when considering amendments of the LUB... in addition to all other criteria as set out in various policies of this MPS , to have regard to the following matters:

(a) That the proposal conforms with the intent of this MPS and with the requirements of other applicable Town By-laws and regulations ;

(b) That the proposal is not premature or innappropriate or likely to conflict with any other adjacent or nearby land use by reason of :

- (i) the financial ability of the Town to absorb any cost related to the development ,
- (ii) the adequacy of sewer and water services and utilities or the adequacy of physical site conditions for private on-site sewer and water systems ,

...

- (iv) the potential for damage to or destruction of historic buildings and sites , where designated under the Heritage Property Act ,
- (v) preventing public access to shorelines , waterfronts , or community facilities ,
- (vi) type of use ,
  - precipitating or contributing to a pollution problem in the area ,
  - the potential for the contamination of water courses or the creation of erosion or sedimentation ,
- (viii) [sic] height , bulk , and lot coverage of any proposed building ,
- (ix) traffic generation and the adequacy of affected roads

, access to and egress from the site and parking ,
(x) open storage ,
(xi) signs ,
(xii) any other relevant matters of planning concern ;

(c) Suitability of the proposed site in terms of steepness of grades , soil and geological conditions , locations of watercourses , marshes , swamps or bogs.

4.7 Development Agreements

...

In accordance with Section 55 of the Planning Act , the types of development that will be considered by a development agreement must clearly be identified in an [sic] MPS.

Implemention- Policy 12- ... the MPS provides that the following land uses shall be considered by development agreements ...

(i) within the Residential General designations:
- commercial and office uses ; ...

...

Appendix A

...

Industry

* There is a continued need to provide a positive atmosphere for the fishing industry.

* Clearly zone the government wharves for industrial uses.

...

Municipal Services

* Council should continue to pursue the installation of a centralized water system for the whole Town.

Transportation

* Is there a need for a designated truck route ?

...

Appendix C

...

Industrial Business Inventory
January 1985

...

National Sea Products (Fish Plant-Number of Buildings)
Pierce Fisheries Ltd. (Number of buildings)

... "

The MPS also contained three maps:

Map 1- Existing Land Use

Map 2- Sewer and Water

Map 3-Generalized Future Land Use.

EXCERPTS FROM LUB

"PART 2 ZONES AND ZONING MAPS

Zones

1. ... Lockeport is divided into the following zones , the boundaries of which are shown on the attached Schedules. Such Zones may be referred to by the appropriate symbols.

Residential General R-1

...

Commercial General C-1

...

Industrial General M-1

...

ZONING MAPS

2. Schedule "A" attached hereto may be cited as the Zoning Map and is hereby declared to form part of the By-law.

...

PART 3 INTERPRETATION

SYMBOLS

1. The symbols use on the Schedule "A" attached hereto refer to the appropriate zones established by this By-law.

DEFINED

2. The extent and boundaries of zones are shown on the Schedule "A" attached hereto , and for all such zones , the provisions of this By-law shall respectively apply.

INTERPRETATION OF ZONING BOUNDARIES

3. Boundaries between zones shall be determined as follows:

a.where a zone boundary is indicated as following a street or highway , the boundary shall be the center line of such street or highway;

b.where a zone boundary is indicated as approximately following lot lines , the boundary shall follow such lot lines ;

c.where a street , highway ... or watercourse is included on the zoning maps , it shall unless otherwise indicated , be included in the zone of the adjoining property on either side thereof ;

...

f. where none of these above provisions apply , and where appropriate , the zone boundary shall be scaled from the attached Schedule "A".

...

PERMITTED USES

5.... any use not listed under permitted uses in a particular zone is prohibited.

PART 4 DEVELOPMENT AGREEMENTS

USES CONSIDERED IN DEVELOPMENT AGREEMENTS

...

(a) office and commercial uses ... in Residential General ...

AMENDMENT OF BY-LAW

6. a. ... to obtain the amendment ... submit an application in writing ... to the Clerk ...

PART 6 GENERAL PROVISIONS FOR ALL ZONES

These general provisions apply to all uses in all zones except where a specific zone or use is specifically exempted.

SCOPE

1. a . No building ... shall be erected or altered , nor the use of any building ... or lot ... be changed unless a development permit has been issued and no development permit shall be issued unless all the provisions of this By-law are satisfied.

FRONTAGE ON STREET

2. No development permit shall be issued unless the lot or parcel of land intended to be used or upon which the building ... is to be erected abuts and fronts on a public street ... .

...

STANDARDS FOR PARKING AREAS

19. ... for more than... 4 ... vehicles...

d. the location of approaches or driveways shall not be closer than ... 50 ... feet from the limits of the right-of-way at a street intersection

...

PART 8 RESIDENTIAL GENERAL (R-1) ZONE

R-1 USES PERMITTED

1. ...
   Single Detached Dwellings

Boarding Houses (serviced) and Guest Homes
Converted Dwellings (to a maximum of 4 units)
Duplexes
Hostels (serviced)
Mobile Homes
Semi-detached Dwellings
Nursing Homes and Hospitals (serviced)
Day Nurseries
Institutional Uses (churches to be serviced)
Group Homes
Recreational Uses
Bed & Breakfast
Private storage buildings in accordance with Section 6

...

PART 11 COMMERCIAL GENERAL (C-1) ZONE

C-1 USES PERMITTED

...

Automobile Sales Establishment
Automobile Service Stations including automobile washing establishments as an accessory use conducted on the same lot
...
Business and Professional offices
...
Parking Lots and Parking Structures
...
Repair Shops
...
Parking Lots [sic]

...

PART 13 INDUSTRIAL GENERAL (M-1) ZONE

M-1 USES PERMITTED

1. ...

Any manufacturing , industrial , assembly or warehousing operation conducted and wholly contained within an enclosed building and which is not obnoxious by reason of sound , odor , dust , fumes or smoke , or by reason of unsightly open storage
Any activity connected with the automotive trade
...
Commercial Uses accessory to a main use permitted in a M-1 Zone which is conducted in the main building
Fish plants , but not fish reduction plants
...
Service Industries
Storage buildings for fishing equipment or vehicles
...
Scrap yard
Salvage yard
Auto body shop

M-1 ZONE REQUIREMENTS

2 ... no development permit shall be issued except in accordance with ... Table 7.

PARKING REQUIREMENTS FOR THE M-1 ZONE

3. Off-street parking shall be provided ... :
   a. ... 1 ...parking space for every 1000 square feet of gross floor area used for industrial or wholesale purposes ... ;

   b. ... off-street parking... in the M-1 zone; and
   c. ... has unobstructed access to as public street.

Table 7

M-1 ZONE REQUIREMENTS

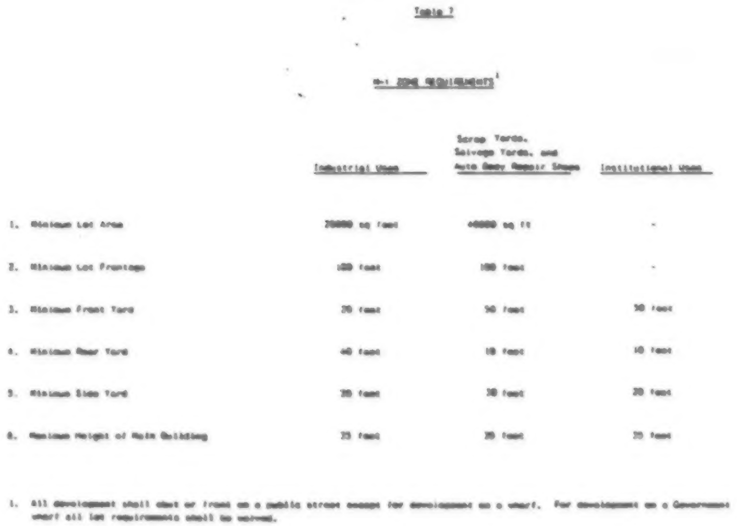


Table 7

M-1 ZONE REQUIREMENTS[1]

	Industrial Uses	Scrap Yards, Salvage Yards, and Auto Body Repair Shops	Institutional Uses
1. Minimum Lot Area	20000 sq feet	40000 sq ft	-
2. Minimum Lot Frontage	100 feet	100 feet	-
3. Minimum Front Yard	20 feet	50 feet	50 feet
4. Minimum Rear Yard	40 feet	10 feet	10 feet
5. Minimum Side Yard	20 feet	30 feet	20 feet
6. Maximum Height of Main Building	35 feet	35 feet	35 feet

1. All development shall abut or front on a public street except for development on a wharf. For development on a Government wharf all lot requirements shall be waived.

ABUTTING ZONE REQUIREMENTS

4. Where a yard or lot ... within the ... M-1 Zone abuts a ... R-1...Zone ...the following restrictions shall apply:

   a. No open storage or outdoor display ... in an abutting yard in the Industrial Zone ;

   b. No parking space ... in an abutting yard within 20 feet of a side or rear lot line ... ;

...

RESTRICTIONS ON OPEN STORAGE AND OUTDOOR DISPLAY

5. Notwithstanding Clause (a) of Section 4 of this Part ...
   a. Open Storage or outdoor display shall not be permitted within the required front yard of a lot ;
   b. ... open storage or outdoor display shall not exceed ... 50 percent of the lot area ;

SPECIAL REQUIREMENTS... AUTO BODY REPAIR SHOP

7. ...
   a. ... minimum separation distance of... 50... between any part of ... auto body repair shop and any abutting residential ... lot line.

   b. ... areas used for loading and unloading or open storage shall be screened ... so as not to be visible from abutting residential ... uses or from public roads.

...

PART 15 DEFINITIONS

For the purposes of this By-law , all words shall carry their customary meaning except for those defined hereafter.

...

2. ACCESSORY USE means a use subordinate and naturally , customarily and normally incidental to and exclusively devoted to a main use of land or building and located on the same lot.

...

7.AUTO BODY REPAIR SHOP means a building or part of a building or a clearly defined space on a lot where motor vehicle bodies are repaired and does not include an auto service station , an automobile washing establishment or an automobile sales establishment.

8.AUTOMOBILE SERVICE STATIONS OR SERVICE STATION means a building... used for the retail sale of gasolines and lubricating oils and may include the sale of automobile accessories and the servicing and minor repairing essentials to the actual operation of motor vehicles.

...

11.BUILDING means any structure whether temporary or permanent... built for the shelter...of ...equipment.

...

14. COMMERCIAL means any use by which retail or wholesale trade is carried on , and those other uses involving sale of goods , materials and services.

...

24. ERECT means to ... alter ... and shall ... include any preliminary physical operation such as excavating , grading ... filling or draining ...

...

38.LOT means any parcel of land described in a deed as a lot or as shown as an appproved lot on a registered plan of subdivision. ...
39.LOT AREA means the total horizontal area within the lot lines of a lot.
...
41. LOT FRONTAGE means the length of a straight line joining the side lot lines where the side lot lines meet the street.
...
43. MAIN BUILDING means the building in which is carried on the principal purpose for which the lot is used.
...
46.OBNOXIOUS USE shall mean a use which , from its nature or operation creates a nuisance or is offensive by the creation of noise or vibration , or by the emission of gas , fumes , dust oil or objectionable odor , or by reason of the unsightly storage of goods , wares , merchandise , salvage , refuse matter , waste or other material.

47.OFFICE means a room... where business may be transacted , a service performed or consultation given but shall not include the manufacturing of any product or the retail selling of goods.

48. PARKING AREA means an open area containing parking spaces , other than a street , available for public use or as accomodation for clients , customers or residents and which has adjacent access ...

49. PARKING SPACE means an area of not less than ...200 ... square feet , measuring ... 10 ... feet by ...20... feet ... for the temporary parking or storage of motor vehicles.
...
60.SETBACK means the distance between the street line and the nearest main wall of and building or structure and extending the full width or length of the lot.

64 .STREET OR ROAD means the whole and entire right-of-way of every highway street or road vested in the Province of Nova Scotia or the Town... .

65.STREET LINE means the boundary line of a street.

66.STRUCTURE means anything that is erected , built , or constructed or parts joined together or any such erection fixed to or supported by the soil or by any other structure. A structure shall include buildings , walls and signs and also fences exceeding ...6... feet in height.
...

73.WATER FRONTAGE means the distance measured in a straight line , between the two points where the side lot lines of a lot meet the navigable watercourse.

74.YARD means an open , uncovered space on a lot appurtenant to a building ... and unoccupied by buildings or structures except as specifically permitted elsewhere in this By-law.
...
74.[sic] ZONE means a designated area of land shown on the Schedules of this By-law."

SCHEDULE C

The Board has looked at Young v.Harnish 37 N.S.R. 213 {5} which has this to say (GRAHAM ,E.J.) at p 220 and following concerning the effect of a federal harbours designation:

> "It was contended that public harbours belong to the Dominion and that the place in which the traps were set formed part of a public harbour. Very likely this is so ... these fisheries do not necessarily constitute a part of the harbour...But , if the foreshore on the margin of a harbour according to that case , may or may not according to circumstances form part of a harbour. At the time of Confederation the Sessions ... could make orders for the conducting of the fisheries in the bays , harbours etc. ... It is not necessary in this view to deal with the question of the right of the Crown either for the Dominion or the Province to give anyone an exclusive right of fishing in a navigable arm of the sea "

Federally designated harbours in this province were also mentioned in Fader v. Smith 18 N.S.R. 433 {6} but that case dealt with "navigable waters " which were not part of any designated harbour. Of interest in these appeals was the finding implicit in the decision that private individuals had the right to litigate amongst themselves concerning their proprietory rights to harvest seaweed which grew in navigable waters. Thus federal designation as navigable waters did not seem to preclude common law proprietory rights but did seem to preclude post-confederation grants by the province . In Fader {6} the trial judge (upheld on appeal as well as upholding himself on appeal) starting at p 433 has this to say:

> " I have disregarded the plaintiff's grant (of April 1881) in consequence of the decision of the Supreme Court of canada in Holman v. Green 6 S.C.C. Rep., 707. I have not overlooked the fact that the shore which was in dispute here is of a very different character from that which was the subject of controversy in that case. It is the shore of a narrow creek or cove , into which small vessels may pass as

far as the locus extends , ... This creek or cove I do not regard as part of those waters which form any of the recognized harbours in St. Margaret's Bay ... I have thought however I should leave to higher authority the drawing of a distinction in legal priciples between the grant of such a piece of coast and the grant of a part of the shore of a harbor like Summerside. I do not feel warranted in narrowing the rule of Holman v. Green , and I prefer not to decide that this case is outside this rule , although it has circumstances which lead me to think that it may be. ..."

Smith , J. agreed in result with the Trial Judge as did (quite understandably the trial judge who sat on his own appeal) Wheatherbe , J. disagreed and felt the Holman v. Green{9} case could be distinguished on its facts. Rigby J. who was listed on the decision head did not file any decision . If silence means assent who did he agree with Smith ,J. or Weatherbe ., J. ? Assuming Thompson , J. was disqualified from sitting on appeal from himself? To the extent that Fader {6} can be an authority for anything in these circumstances of apparent judicial improprieties it seems to determine the mere declaration of land covered with water on the Nova Scotia foreshore will make the provincial Crown grant of rights on that foreshore invalid.

The Board also looked at Sword v. The Sydney & Louisburg Railway Co. 23 N.S.R. 214 {7} . This appeal concerned a claim for dower made by the widow of a predecessor in title to the corporate defendant who resisted the dower on two main grounds: 1. The post confederation provincial grant through which the deceased had claimed his title was non-operative because it was a grant to a portion of "a water lot or lot covered with water" being land under the federally designated Sydney Harbour and thus fell within the rule in Holman v. Green{9}. Since the deceased could have no title to federal harbour land from a provincial source he had no title to which his widow's dower could attach and therefore the widow had no dower rights in the land in question.

2. The statute of incorporation of the corporate defendant purported to convey clear title to the subject lands and this statutory creation of title would defeat the widow's dower.

The widow won some dower or at least a money equivalent of some dower. Let's see what the various appeal judges had to say , at least to the effect of federal harbour designation in Nova Scotia.

Townshend J. starting at p 215 :

> "...The plaintiff ... contends that defendants allege or set up any defect in the title under whom they obtained their own title , and the company is estopped from making any such defence to a claim for dower . ... I am of the opinion that it is not open to the defendant company to set up defence of want of title where they have not acquired paramount title , and where , as in this case the rightful owner , the Crown , has not asserted its superior title. Neither do I think the plaintiff can be held to have waived estoppel by putting in the grant from the Crown under which [the deceased] acquired seisin , rightly or wrongly , of which he was never dipossessed , and especially when , so far from waiving the estoppel , it is expressly set up."

Townsend J. to this part of his decision assumes that the federal harbours designation deprives the province from making a grant of title to the land in question but says , because of facts peculiar to this case the defendant is estopped from taking benefit from this position.

On the second of the defendants' arguments Townsend J. has this to say :

> "These words are evidently large enough to cover such an interest as dower , and consequently would defeat the plaintiff's action , unless the argument should prevail that the local Legislature had no power so to limit plaintiff's rights in property over which they possessed no jurisdiction.[emphasis that of the Board]. This is a point of some difficulty , but it need not necessarily be decisively determined in this action. As it is beyond controversy that the title to this land is in the Dominion Government , how can we assume that the legislation in question was intended or did apply to it? ... It will certainly not be assumed that the legislature intended to exceed its powers when no language is to be found in the act which necessarily involves that result. The contrary is rather the rule , that the words will be applied to such subjects as come within their legislative sphere. This act therefore cannot ... have ...force in relation to the lot in which this plaintiff claims dower. ..."

Townsend J. has said the federal harbour designation removed the land in question from the jurisdiction of the provincial legislature to deal with it at all in all its various aspects. Yet he would set off for her in rem her dower.

Ritchie J. , starting at p 218 made these comments :

> "... that as against the defendant company the plaintiff has a claim for dower ... but I think the act of the local legislature ... invoked by her in support of her claim , prevents her from having dower in the property set off for her and restricts her claim to the recovery of compensation only for her right of dower. It was contended that the act was ultra vires the local legislature , the land in question being between high and low water marks in a public harbour , and Holman v. Green was cited as authority for the proposition but that case does not touch the right to legislate : it only decides that ungranted land between high and low water marks in public harbours belonged to the Dominion of Canada and could not be granted by the local government and does not question the authority of the local legislature to legislate in respect to property and civil rights in the province , even though it should affect the shores of public harbours. In my opinion the local

> legislature had full power to legislate in respect of the plaintiff's rights in the property and her claim for dower is covered by provisions in the act which vests the title in the defendant company reserving [only] the right to compensation. ..."

With this reasoning Ritchie J. would have allowed compensation for dower only. Meagher J. applied estoppel to as did the other two judges to find the plaintiff's right to dower as against the defendants. He also determined to give a narrow interpretation to the statute relied upon by Ritchie J. to prevent the in rem setting off of dower so that he could set off the dower in rem for the plaintiff. His reasoning for avoiding some of the effects of the correcting statute differed from that of both Ritchie J. (who found the local law intra vires of the provincial legislature) and Townsend J. who said the the statute was ultra vires and therefore could not bind the plaintiff. Meagher J. seemed to rely on some rule of statutory interpretation which allowed him to find the legislature could never have intended to affect the rights of property holders in the way suggested:

> "I take it for granted the deed in question was before the legislature when considering this enactment , and if so it afforded on its face why it should not enact a statute affecting this property. If requested to pass such a statute the answer of that body would be you already have a good title to this property , you have a covenant to protect you if your title thereto is not good and this body will not interfere to help you. "

To a modern day Board this reasoning of Meagher J. looks like an early type of Charter of Rights for rights in property , judically imposed , rather than an exposition of the then current view that the legislature acting wihtin its own ambit was supreme. Meagher J. and Townshend J .'s votes carried the day at least in that appeal . Their reasons did not support one another and thus leave Ritchie J's reasons to have somewhat more validity than they might otherwise have had.

Hamilton Harbour Commissioners v. City of Hamilton et al. 91 D.L.R.(3rd) 353 [8] , cited to the Board by Mr. Larkin , seems to adopt the Ritchie J. approach (without any reference thereto) spelled out in Sword v. The Sydney & Louisburg Railway Co. [7] .. The main decision herein was delivered in the trial division before Griffiths J. and merely , and in the main , upheld in the Ontario Court of Appeal.

Grifiths J. starting at page 356 has this to say:

> "Neither the Commissioners nor the Attorney-General of Canada contend that in 1867 , the Hamilton harbour was a public harbour within the meaning of s.108 and the third schedule of the B.N.A. act. By the joint operation of s. 108 and Sch. III , any harbours falling within the category of ' public harbours ' became the property of the Crown in the right of the Dominion. ...
>
> In 1846 the statute incorporating the city ... defined the boundaries of the City to include ' the harbour in front of the said Town. ' ... If the harbour was excluded from the territorial jurisdiction of the City then obviously the City could not enact valid by-laws affecting the harbour. [emphasis the Board's] ... As to the ownership of the bed of the harbour , if the whole of Burlington Bay , which comprises the Hamilton harbour , did not vest in the City of Hamilton prior to 1867 , the remainder of the Bay in my opinion was recognized as vesting in the Crown in the right of Ontario by an agreement entered into between the Dominion and Ontario ...1961 , given statutory effect by complementary federal and provincial statutes ...By Order in Council ... 1947 ... Ontario had quitclaim [sic] to such ownership in favour of the City , and by a deed ...1948 ...

the City conveyed to the Commissioners all of the bed of the harbour, excepting any portions previously granted by the federal or provincial governments. ...

Mr. Aylen on behalf of the Attorney-General of Canada submitted that the Commissioners hold their lands as a crown agent of the Dominion Government and the federal jurisdiction over these lands stems from s.91 (1A) of the B.N.A.Act (' The Public Debt and Property ') as well as s.91 (10) (' Navigation and Shipping ') ... the Commissioners ... are in a sense , masters in their own house. ... The authorities are clear in these circumstances , where the Commissioners are not subject to direct control and have a wide range of independent authority , they cannot be considered an agent of the Crown ...[and therefore] I find that the Commissioners are not a Crown agent and that their lands are not public property within the meaning of s. 91 (1A) of the B.N.A. Act. ...

In my view , a reasonable interpretation is that waterfront property is that real property abutting or fronting on...body of water... . I consider water lots as being those real estate lots bordering on the shoreline of the harbour that are under water. ...

In the intevening years , many of these inlets have been filled and the shoreline of the habour has receded ...

None of the by-laws enacted [by the Commissioners] purports to exercise a land-use control over private lands in the sense of designating the use to which such private lands might be put. ...

The practice observed generally where any harbour dredging operation is to be carried out on a private basis , is for the party involved to apply to the Commissioners for a permit authorizing the necessary dredging. The dredging of private property in the harour is carried out ....

The first question for determination is whether under the provisions of s.91 of the B.N.A. Act , Parliament had legislative authority to enact the Commissioners' Act ...

There is no specific head of federal jurisdiction in s.91 ... giving Parliament legislative authority in relation to ' harbours ' . Section 91 (10) gives Parliament exclusive jurisdiction over ' Navigation and Shipping '. In addition , pursuant to s.91 (29) , the Federal Government [sic] is given power over other aspects of water travel in the exceptions to s.92 (10) ...Other heads of federal power which bear on the question of jurisdiction over water transportation are s.91 (9) ... 91 (12) ...91 (13). ...

Under head 10 of s.91 , Parliament has enacted the Navigable Waters Protection Act , R.S.C. 1970, c N-19. That act gives to the Minister of Transport the primary responsibility for the control and use of 'navigable waters ' . Hamilton Harbour ... is a navigable water within the meaning of that Act and the Federal Government exercises jurisdiction over the navigable waters of the harbour. ... 'Now there is no doubt that the power to control navigation and shipping is to be widely construed. ' By implication the Privy Council in the Montreal Harbour case recognized the jurisdiction of the federal government over harbours. In 1873 Parliament passed a statute purporting to extend the Montreal harbour beyond its existing limits. ... although the statute could not enlarge the property rights of the Dominion or enable it to take land for harbour purposes without compensating ...

Having decided that the Dominion has legislative jurisdiction over the subject matter of harbours , it remains to be determined to what extent Parliament has under the provisions of the Commissioners Act ... assigned to the Commissioners the right to regulate and control lands within the limits of the harbour ...

I conclude that the Commissioners' Act ... conferred on the Commissioners absolute jurisdiction over land uses on lands owned by the Commissiioners to be developed for shipping and navigation or harbour purposes. ... the Act conferred jurisdiction on the Commissioners to enact by-laws controlling the use of such private lands to the extent that such land uses might interfere with the navigation and shipping activities of the harbour , but the Commissioners may not exercise their jurisdiction in such a way as to affect the proprietory rights of private landowners. ... the first important issue then is whether the Commissioners having ... a jurisdiction over both their own lands and privately owned lands within the harbour , can be said to exercise jurisdiction to regulate the use and development of such lands , or whether there there is an area of shared authority admitting of regulation by both federal and provincial Governments through their statutory delegates.

The City as a creature of provincial legislation derives its authority to enact by-laws to control land use through the provisions of the Planning Act... Although it has never been expressly decided , legislative authority to control the use of land generally undoubtedly belongs to the Province under s.92 of the B.N.A. Act within head 13 ' Property and Civil Rights in the Province ' or head 16 ' generally all Matters of a merely local or private nature in the Province. ' ... the courts have attempted to define where possible mutually exclusive spheres for federal and provincial powers. Not always has the mutual exclusion been feasible or possible because of the many facets of community life which do not readilly fit into watertight compartments of legislative subject matter. The Courts have recognized ' overlapping ' or ' concurrent' fields of jurisdiction in some instances with the result that both authorities are prermitted to legislate in a particular field. This proposition ... is known as the ' aspect ' theory ... ' subjects which in one aspect and for one purpose fall within sect.92 , may in another aspect and for another purpose fall within sect.91' ....

the authorities are clear that while both legislative bodies may exercise concurrent jurisdiction in overlapping fields , where there is conflict , in the sense that compliance with one law involves breaching the other , the Dominion power must prevail and the competing enactment is suspended and inoperative. ...

In my view , the establishment of the Commissioners to administer the harbour of Hamilton does not thereby constitute the harbour a ' federal enclave ' immune from provincial legislation....

the harbour may be , as a harbour , ' within the jurisdiction of the Parliament of Canada ' but is none the less , for the purposes within the ambit of provincial legislation , within the jurisdiction of the Province and its Legislatures , provincial and municipal. "

The court of appeal made this ammending comment:

" Some of the land surrounding the harbour is owned by ... the Queen in right of Canada. The Province of Ontario and the City of Hamilton have clearly no jurisdiction in respect to such land. ... the legal position is so clear that we think a declaration is unecessary. "

Holman v.Green {9} already alluded to above deals with a post-confederation provincial grant of land in Summerside Harbour. With no doubt whatsoever, all SCC judges in that case find that title to the foreshore of Summerside Harbour vests in the Federal Crown as of Confederation and therefore the Provincial Crown could not grant the land which it had owned as a colony immediately before Confederation. If the judges had stopped there no quarrel would be made with the finding in this case as contrasted with the findings in Hamilton Harbour Commissioners {8}. Various of the learned judges in Holman v. Green {9} went on to say:

Ritchie C.J. starting at p711

" The locus in quo in this cae is situate between high and low water mark in the harbour of Summerside ... which is a public harbour ... By section 108 of the B.N.A. act 1867 , headed: ' Transfer of property in schedule ' the provincial public works and property enumerated in the third schedule to be property of Canada are ... 2 Public harbors. ... The property in public harbors being thus vested in the Dominion , the soil ungranted at the time of Confederation between high and low water mark , and being within the limits of public harbors became vested in the Dominion as part and parcel of the harbors which belonged as property to the provinces , as distinct from the franchise of a port ... It is but consistent with this that the property in public harbors ... should likewise be vested in the Dominion for their more efficent management , control and regulation ; ... and which could hardly be effectually managed and regulated if there were to be divided control . Still less can it be supposed ... the property in and control of the public harbors should have been left to provincial authority. ... this clause relating to public harbors is alike applicable to all provinces ... and therefore the executive government and legislature ceased to have any property in , or executive or legislative power over , the ungranted lands between high and low water mark in such public harbors as that in question ... "

Strong J. commencing at p 714 adds this :

"... by the common law of England the sea shore between high and low water mark , or as it is sometimes called the foreshore , is vested in the Crown. ... therefore at the date of admissioin of Prince Edward Island ... the land in question formed part of the demense lands of the Crown belonging to the province ... Then ... all the provisions of that Act became applicable to the province , including the 109th section , which enacted that the public lands should belong to the provinces in which they were situated , and the 117th section , which provided that the several provinces should retain their public property not otherwise disposed of by the act. These lands would therefore have remained property of the province after Confederation , unless by some particular enactment they were distinguished from the ordinary Crown lands and taken out of the operation of the 109th and 117th sections being expressly vested in the Dominion. The only section which can have this effect is the 108th , which enacts that :

> The public works and property of each property enumerated in the third schedule to this act shall be the property of Canada.

The second enumeration of the schedule referred to is ' Public Harbours.' ... there is nothing in the context which would warrant us in restricting the wide general description of ' public harbors ' to remain different from that which the words bear in their ordinary and primary signification. ... -Does the the descriptiion ' Public Harbors ' include the bed or soil of the harbor? and if so , is the foreshore also comprised in it ? I am of the opinion that there is even less doubt on this head than on the first point. By the attribution of the harbors to the Dominion it never could have been meant to transfer a mere franchise to the Dominion Government- that is to the Crown in the right of the

Dominion-leaving the property of the soil in the right of the province. Such a construction would be so arbitrary , unnatural and improbable as to be totally inadmissible. Who ever heard of the Crown , as a body politic representing one Government , having a franchise in th property of the Crown itself as a body politic representing a distinct Government ? Then the object of vesting the harbours in the Dominion was doubtless with the object of enabling that Government to carry out with more facility such measures as it might , under the power granted to it to legislate on the subject of navigation and shipping , from time to time think fit to enact..... the fair inference is therefore that it was intended to transfer the harbors in the widest sense of the word , including all proprietary as well as prerogative rights , to the Crown as representing the Dominion ...

that the foreshore is comprised in and forms part of the harbor , and passed to the Dominion under that denomination , is too plain to need demonstration , ..."

Fournier J. had this to say starting at p 721

"... le quai de la Reine , est un quai public , construit par le gouvernement local . Ce quai fut construit vers l'annee 1840 , et a toujours ete employe' depuis comme quai public a l'usage des nombreaux vaisseaux qui frequentent le havre de Summerside.

ces admissions constatent d'une maniere certaine que le havre de Summerside est un havre public...

Du moment que la propriete' du havre est devenue celle du gouvernement federal , le gouvernment de l'lle a cesse' d'y avoir acun droit. ... "

Henry J. expressed some doubts that the soil might still belong to P.E.I. but in result he concurred with the other judges.

Gwynne J. also stuck his oar in the pot and gave it a little stir. He probably stated the question before the court correctly. The Board starts quoting him from p723:

" ...is a deed executed by ... a ...province ... competent and effectual to transfer to a person named in that deed ... the legal estate in property which by , force of the provisions of the B.N.A.Act , is vested in Her Majesty for the public purposes of the Dominion , and is for that purpose expressly placed under the exclusive control of the Dominion parliament....

> Upon [P.E.I/] beeing admitted into the Dominion ... the legislative authority of the Parliament of Canada ... became absolute and exclusive over all public harbors situate in the island. Her Majesty remained seized of those harbors and of the land covered with the waters thereof , jure regio for the public purposes of the Dominion and subject to the exclusive control of the parliament of Canada.
>
> Under the provisions of the Dominion statute , 37 Vic., c. 34 , and the orders in council made in pursuance thereof , the Dominion government has assumed control over the piece of land situate in the harbor ... which the plaintiff's claim to be their property ... "

If both Hamilton Harbour Commissioners {8} and Holman v.Green {9} are both still good law then obviously they are conflicting authorities. Hamilton Harbour Commissioners {8} allows for concurrent federal and provincial jurisdiction over the " dipper " and thus supports the Town's position in this appeal. If the judicial statements almost unanimously expressed by the Supreme Court of Canada in Holman v.Green {9} are correct law in Nova Scotia then there may be merit in the Appellant's " determinate " argument. Sword v. The Sydney & Louisburg Railway Co. {7} and Fader {6} both pay lip service to Holman v.Green {9} as being the law of Nova Scotia at the time of their respective decisions.

The main factual distinctions between Holman v.Green {9} and Hamilton Harbour Commissioners {8} are the following:

1. There is a finding in the former that Summerside Harbour , at the time of P.E.I.'s joining of Confederation was a harbour while there is a finding in the latter that at the time of Ontario's Confederation with the three other provinces Hamilton Harbour was not a public harbour.

2. The dispute in the former was between two private owners disputing alleged private property rights with the apparent conflict between provincial and federal jurisdictions being at least one step beyond the dispute before the court (one might say the inter-governmental disputes were disputes by proxy or even vicarious).

3. There was no mention in the former case (as we find in the present appeal) of how the Federal Crown was involved in the harbour concerned (whether through a Crown Agent or through some other device) while in the latter case there was a specific finding by the court that the Commissioners , although representing the Crown were not a " crown agent."

Hamilton Harbour Commissioners {8} (circa 1978) made no mention of Holman v.Green{9} or the other old cases from Nova Scotia which interpreted applied and (perhaps) avoided Holman v.Green {9}. In Le Procurer General De La Province De Quebec c. Edouard Healey [1979] C.S. 286 {10} at page 292 of that decision , Madame le juge Claire L'Heureux-Dube (presiding in her then den of the Quebec Superior Court , circa 1979) used Holman v.Green{9} as authority for the following proposition:

"1) Les cours d'eau navigables et flottables de la province de Quebec sont des dependances du domaine public provincial quebecois et le lit de ces cours d'eau appartient en principe au gouvernement provincial , a moins d'avoir ete concede expressment[15] ."

From this citation the Board must , at the minimum , conclude that as an non-obsolete authority Holman v.Green{9} was very much alive in 1979 and is likely of some persuasive authority today .

The Board had occasion to peruse certain other cases and a learned article which dealt with harbour status in Canada. Kennelly v. The Dominion Coal Co.,Ltd. et al (1904) N.S.R. 495 {11} dealt with a water lot in Sydney harbour. Ritchie J. , the trial judge , at p 496 had this to say

> "... I think this case is governed by that of Holman v. Green ... The court held that , after the passing of the B.N.A. Act , the executive governments and legislatures of the different provinces ceased to have any property in , or executive or legislative power over the ungranted lands between high and low water marks in the public harbours ..."

The appeal from this judgment was reported in the same report (together with some very cogent arguments) and Townsend J delivered the decision concurred in by the two other judges sitting on this appeal :

> " ... The question presented ... is identical with that heard and decided by the Supreme Court of Canada in Holman v. Green ... the title to the foreshore and land covered with water in public harbours. ... The ... Attorney-General ... , in support of the Provincial rights , asserted , in strong terms , the undoubted authority of the Province over all its lands , whether covered with water or not , saving only such lands as were assigned the Dominion , or may hereafter be taken by the Dominion in public harbours for public works ... , but apart from that paramount right , every foot of land , whether foreshore or under the water , belonged , under his contention to the Province alone.
>
> the difficulty in ... such proposition is that it is directly contrary to the law as laid down in Holman v. Green , by which this court is bound , unless ... a Court of higher authority has declared it to be erroneous. ... Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces (1898) A.C. 700 ...[alledgedly throws] doubts on the correctness of that decision I am unable to adopt that view of Lord Herschell's judgment. He says :
>
> ' ... the Supreme Court in arriving at the same conclusion , founded their opinion on a previous decision in the same

court in the case of Holman v. Green , where it is held that the foreshore between high and low water mark , on the margin of the harbour , became the property of the Dominion as part of the harbour. Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question , what falls withion the description of "public harbour ". They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would be misleading and dangerous. It must depend ... upon the circumstances of each particular harbour , what forms part of that harbour. It is possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court , in the case of Holman v. Green , that if more than the public works connected with the harbour passed under that word , and if it included any part of the bed of the sea , it followed that the foreshore between high and low water mark , being also Crown property , likewise passed to the Dominion. Their Lordships are of the opinion that it does not follow , that , because the foreshore on the margin of a harbour is Crown property , it necessarily forms part of the harbour. It may or may not be so according to circumstances. ... there are other cases in which , in their Lordship's opinion , it would be equally clear that it did not form part of it.'

The only expression of disapproval in these remarks is that the Supreme Court went , unecessarily too far in laying down as law , that , because the foreshore is Crown property , therefore it forms part of the harbour. ... With th above exception , we must accept Holman v. Green as correctly stating the law on the subject. ... There is only one point open for discussion in this case ... whether , under the evidence , the locus is part of Sydney Harbour , and that must be determined in the manner laid down by the Privy Council... it must be judged by the circumstances-it may or may not be ...'It must depend upon the circumstances of each particular harbour what forms part of the harbour.' ...From these extracts , which are...all the evidence on the subject ... up to the present very little , if any , use has been made of the harbour as far south as the locus , and that such wharves as have been built were merely for private use , yet the harbour there is quite navigable , and suitable for shipping and trade purposes and that with the growing importance of such a town as Sydney , when the time comes , the shore and the water there will be required by the public in conducting general business.

Now , in adjudicating on a question of this kind , we should be governed by a broad general view of the whole situation. Regarded from that stand point , I cannot doubt that the locus of the alleged trespass is in Sydney harbour and vested in the Dominion as representing the Crown. ...

Any doubt on this question , as far as we are concerned , is settled by the decision of this court in Fader v. Smith .. . and the course we should pursue [His lordship then went on to quote extensively from the decision in Fader v. Smith which excerpts are already set out herein] "

Charles Anderson v. His Majesty the King and M.A. Nickerson (1919) 59 S.C.R. 379 {12} is a Supreme Court of Canada case which, since the bench evenly divided, upheld the Exchequer Court decision appealed to it. The case concerned the wreck of a vessel which was a hazard to navigation and the power of the Federal Crown to order the disposal of the wreck. It is of interest in this appeal primarily because it makes some findings concerning a Nova Scotian harbour, Barrington Passage.

Edward Maxwell v. His Majesty the King (1917) 17 EX.C.R.97 {13} was also a case concerning a Nova Scotia harbour, Bedford Basin. This was a hearing to determine whether compensation should be paid for the federal expropriation of certain water lots located on the west side of Bedford Basin. Cassels, J., commencing at page 98 decided:

"... As to the water lot, the contention of the crown is that Bedford Basin was at the date of the Confederation Act, 29th March, 1867, a public harbour and became the property of the Dominion, and that the grant of the water lot by the Province of Nova Scotia after Confederation is void.... It becomes necessary to consider whether ... Bedford Basin was or was not at the date of Confederation a public harbour. If [it was] ... the grant of water lot by the Province ... passed no title....

What constitutes a public harbour in contemplation of the Confederation Act is a question of difficulty....

In ...Attorney-General of Canada v. Ritchie Contracting and Supply Co., the question has been elaborately discussed by ... the Supreme Court. This case is inscribed for hearing before... the Privy Council, and possibly some more light may be thrown on the subject. The decision of the Supreme Court makes ... clear ... to be a public harbour under the ... the Confederation Act it must have been a public harbour at the time of the enactment, and that a potential harbour , not a harbour at the date of the Confederation Act , but subsequently becoming a public harbour , is not covered by the statute."

Judge Cassels then went on to review all the evidence before him as to the status of Bedford Basin as a harbour at the time of Confederation . After that review he visualizxed his duty as follows:

> " It has to be kept in mind that in dealing with this question ... the Court has no records of an official kind delimiting the boundaries of the harbour and must arrive at the result from the best evidence obtainable."

Zwicker v. Lahave Steamship Company (1911) 9 E.L.R. 114 {14} is a Nova Scotia decision affecting the use of the waters in the LaHave River. This was perhaps a case which really dealt with obstruction to navigation made by stakes put in the river by the Plaintiff ostensibly marking his boundary lines to a water lot . Townsend C.J. at p 115 said :

> "... following the law laid down in Holman v. Green 6 S.C.R. 707 ; Attorney-General of Canada v. Attorney -General of Ontario (1898) Ap. C. 700 and Kennelly v. Dominion Coal Company , . 36 N.S.R. 495 , ... judgment must be for the defendant company ... "

The Sisters of Charity v. His Majesty the King (1919) 18 Exc. C.R.385 {15} Cassels , J. again tackled the shores of Bedford Basin in an expropriation matter. He again held that Bedford Basin was part of Halifax Harbour and as such became Dominion property on Confederation and that provincially granted water lots made subsequent to Confederation were defeated by that fact. He went on to decide that , on the facts of the case there were no riparian rights worthy of the name and that no possessions had been acquired sufficent to defeat the title to the federal Crown.

The Attorney-General for the Province of British Columbia ex rel the City of Vancouver v. the Canadian Pacific Railway (1904) 11 B.C.R.289 {16} contained the decision of Duff , J. (as he then was) who found that at the time of B. C.'s admission to Confederation the disputed portion of Vancouver Harbour used by the C.P.R. acting pursuant to a federal statute for railway purposes was part of Vancouver Harbour and passed to the federal Crown on B.C.'s entrance into the Union by virtue of section 108 of the B.N.A.Act .

The Appeal Division of the British Columbia Supreme Court upheld this finding unanimously but then went on to decide that the same legal effect would occur with harbours designated or used as such after the accomplishment of Union. Martin , J. justified the embellishment of the trial judge's decision in the following words found at p299:

> "...since we are informed that it is the intention to carry this case to the ... Privy Council , it seems desirable , in the event of another view being taken of the facts to consider the more important question raised before us ... was it competent [etc] ... "

The Attorney General of Canada v. Western Higbie and Albion Investments Ltd. and the Attorney General for British Columbia[1945] S.C.R. 385 {17} has the Supreme Court of Canada dealing in divers ways with divers judges with the harbour status of Coal Harbour , a inlet off Burrard Inlet , all arriving at the same result with many differing reasons. They all agreed that the question of the use of the foreshore at the time of B.C.'s access to Confederation (1871) was a question of fact and might be independent of a finding that the body of water to which it was a foreshore was at that time a public harbour. The bottom line to which all agreed was that the admission by reciprocal provincial and federal orders-in-council in 1924 was proof of the fact that the relevant area was a public harbour in 1871 and thus became property of the Dominion under Schedule III of section 8 of the B.N.A. Act. The head notes to this appeal adequately set out the various approaches of the judges used in arriving at their individual results but for the purposes of the present appeal a few remarks from the decisions may be pertinent and are thus now quoted:

Rinfret , C.J.C (for himself and Taschereau , J.) at p 395.

> ... "There is no doubt that prior to 1871 the foreshore was Crown property of the Colony , now the province of British Columbia and ... in order to succeed the Appellant has the onus of proving that it has since passed to His Majesty in right of the Dominion of Canada. ... It is now well settled by decisions of the Privy Council ...that the questions whether a certain area was a public harbour , within the meaning of the Schedule , at the time of Confederation , and also whether a certain particular point on that area formed part of the harbour , stand to be decided as questions of fact.
>
> ...
>
> When the Crown , in the right of the Province , transfers land to the Crown , in right of the Dominion it parts with no right. What takes place is a change of administrative control. ... 'The Crown is one and indivisible within the Empire , ...' There was no express grant of the foreshore and it is not to be implied. ...the grant itself does not purport to convey the land down to low water mark ; and it must be remembered that the soil here is prima facie in the Crown. "

Kerwin , J. came to the same result for himself and Hudson , J. and had these reasons which may bear on the present appeal:

> "... there is no evidence in this case that the foreshore with which we are dealing had been actually used as a place of public access for the loading or unloading of ships , or similar harbour purposes , on or before June 20 , 1871. ... It is apparent that the question of fact was confined to the particular piece of foreshore there in question.
>
> While , therefore , I am satisfied that in 1871 Burrard Inlet was a public harbour and that Coal Harbour was a part of it , I would be unable to find that the foreshore in question formed part of that public harbour were it not for the two orders in council mentioned above ... as time passed it was becoming increasingly difficult , if not impossible , to show that any particular bit of foreshore was part of a public harbour at the relevant date. ... this fact was realized .... "

Rand , J. also agreed in the result but with these reasons:

> " ... the Crown has not proved the foreshore to have been part of a public harbour at the time ... when the Province entered the Dominion.... It must be shown as a fact that the land about which the question arises was at the time of union in actual use in the public commerce of a harbour. ... The notion that a natural harbour , once shown to have been used for commercial purposes along some part of of its shore , is a Dominion public harbour as to all of its shore is erroneous.
>
> Disregarding any question of the nature or extent of ownership below low water mark it would be logically necessary to traverse the whole shore bordering on... a body of water ... and to establish in fact for each segment the required use. Precise limits or boundaries from such use are out of the question. Unless characterized in its practical application by broad considerations of convenience , as undoubtedly the decisions mentioned contemplate , the rule might work out a patchwork of ownership both inconvenient and embarrassing.
>
> Without some action by the Dominion , fully equipped commercial ports or harbours do not appear to be within the powers of the province to set up. ... with the property in a public harbour below low water mark generally in the Dominion , the Provincial and Dominion ownership of sections of foreshore , isolated from upland , with occasional private ownership annexed to upland , presents a mosaic

which I will not further complicate by suggesting a possible parcelling of ownership of the harbour bed itself.

Now that was the situation confronting the Dominion and the Province when in 1924 they took steps to settle the controversy over harbours in British Columbia. ...

The question before us , then , is whether that arrangement [the orders in council mentioned] in any aspect , in the abscence of provincial legislation authorizing it , is sufficent for the purposes of the Dominion in this proceeding. ...

it lies within the authority of the provincial executive to give formal binding recognition of a claim asserted by the Dominion."

The King v. Jalbert et al [1938] 1 D.L.R. 721 [18] is a Privy Council decision dealing with the foreshore of the Saguenay River at or near Chicoutimi which was alleged by the federal government to be a public harbour at the time of Quebec's entrance into Confederation .

The Privy Council had laid down the following reasons which may bear on the present appeal.

" ... The defence pleaded was a denial of the respondent's title... since the title to the beach lot was vested in the Dominion under s.108 and the Third schedule to the B.N.A.ACT ...the beach lot being part of a public harbour existing at Confederation at Chicoutimi.

... The Saguenay is a navigable river ...

The material date for the decision of the question in this case is the date of Confederation ... . As the property in the foreshore and in particular this portion was Crown property and thus prima facie belonged to the Province , the onus was on the Appellant to show that it had passed to the Dominion under the Act.... the Supreme Court ... judgment ... considered that it was not necessary to decide whether Chicoutimi was or was not a public harbour because... the real question was whether the ... piece of foreshore was a constituent or integeral part of a public harbour. ... [and] decided there was no evidence that it was and on that ground allowed the appeal. Their Lordships agree with ...[the] decision and the reasons on which it is based. ... it is not desirable to attempt a precise or exhaustive definition of the words 'public harbour' used in Schedule to s.108. ...

the cases actually decided under the statute embody some guiding limitations and rules and afford some illustrations which are of value in considering the present case...On the other hand the Board denied the proposition that because the

foreshore on the margin is Crown property , it necessarily forms part of the harbour,...
It is clear from these decisions that if what is in question is a particular piece of the foreshore , the issue is not decided by determining whether the harbour is a public harbour but is decided by considering whether even if there is a public harbour within the ambit of which the piece of foreshore is , the piece of foreshore has been actually used as place of public access for the loading or unloading of ships or similar harbour purposes at the material time. This is a question of fact , not to be concluded by general consideration , such as whether or not there are public works upon it.... their Lordships bear in mind the danger of attempting to limit or define exhaustively the important words ' public harbour ' in this section or go beyond what is necessary for the case. They accordingly abstain from expressing any opinion on the facts whether Chicoutimi was a public harbour in 1867. ... the only question material to this appeal... whether the actual spot the beach lot could , on any view as to the status of the harbour as a whole , be described as a public harbour , that is , a constituent or integeral part of a public harbour. This is an enquiry distinct from the enquiry whether the larger area in the ambit of which the spot exists is a public harbour....The onus is on the appellant to establish his claim affirmatively , but he does not ... produce any evidence which would justify the conclusion ... the ... lot was at , or previous to 1867 , used for any purpose...or was ever a place of public access for such purposes..."

Attorney-General of Canada v. Attorneys-General of Ontario , Quebec and Nova Scotia [1898] A.C.700 {19} came to the Privy Council on appeal from a governmental reference. The tricky matters of harbours and foreshores was dealt with in the course of the decision. Lord Herschell had these opinions in his decision:

"...Before approaching the particular questions submitted ... it ...[is] well to advert to certain general considerations which must be steadily kept in view ,...
It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown , or what public rights in respect of them. Whether a lake or a river be vested in the Crown ... Dominion ...or ...province ... it is equally Crown property , and the rights of the public in respect to it , except in so far as they may be modified by legislation , are precisely the same. The answer ... to such questions as those adverted to would not assist in determining whether in any particular case the property is

vested in the Dominion or in the province. It must also be borne in mind that there is a broad distinction between the proprietory rights and legislative jurisdiction. The fact that such jurisdiction in respect to a particular subject-matter is conferred on the Dominion Legislature , for example , offers no evidence that any proprietory rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietory rights were transferred to it.... Whatever proprietory rights were at the time ... possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion... .

It is necessary to deal with the several subject-matters...separately , though the answer as to each of them depends mainly on the construction of the 3rd schedule to the British North America Act. ...

With regard to public harbours... no doubt...whatever is properly comprised in this term became vested in the Dominion... .The Supreme Court , in arriving at the same conclusion , founded their opinion on a previous decision in the same Court in the case of *Holman v. Green*...where it held the foreshore between high and low water-mark on the margin of the harbour became the property of the Dominion as part of the harbour.

Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question , what falls within the description ' public harbour '. They must decline to attempt an exhaustive definition of the term applicable to all cases.... It must depend , to some extent , at all events , upon the circumstances of each particular harbour what forms part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been the thought by the Supreme Court in the case of *Holman v. Green...*that if more than the public works connected with the harbour passed under that word , and if it included any part of the bed of the sea , it followed that the foreshore between the high and low water mark , being also Crown property , likewise passed to the Dominion.

Their Lordships are of the opinion that it does not follow that , because the foreshore on the margin of a harbour is Crown property , it necessarily forms part of the harbour. It may or may not do so , according to circumstances. If , for example , it had been actually used for harbour purposes , such as anchoring ships or landing goods, it would , no doubt , form part of the harbour ; but there are other cases in which , in their Lordship's opinion , it would be equally clear that it did not form part of it.

....

The supreme legislative power in relation to any subject-matter is always capable of abuse , but it is not to be assumed that it will be improperly used ; if it is , the only remedy is an appeal to those by whom the Legislature is elected. If , however , the Legislature purports to confer upon others proprietory rights where it possesses none itself , that ... is not an exercise of the legislative jurisdiction conferred by s.91. If the contrary was held , it would follow that the Dominion might practically transfer to itself property which has ... been left to the provinces and not vested in it."

The Attorney-General of British Columbia v. The Attorney -General of Canada (1889) 14 A.C.295 [20] is another Privy Council decision dealing with the division of property between the provinces and the Dominion. In this case the dispute centered around the precious metals contained in and under the land which had been " conveyed " by the amendment to the Act of Union between B.C. and and Canada being a 40 mile wide swathe reserved for the trans-continental railway.The dispute was resolved in favour of the province.

The Western Counties Railway Company v. The Windsor and Annapolis Railway Company(1882) 7 A.C. 178 [21] , also a Privy Council decision , dealt with sec.108 and Schedule 3 of the B.N.A. Act in its listing of railways. Private Rights accruring under a statute passed by Nova Scotia during the interval after March 29th , 1867 (when the B.N.A. Act was passed by the Imperial Parliament) and before July 1 , 1867 (the date on which the B.N.A. Act came into force) were alleged to have been abrogated by the passage of a federal statute passed in 1874 . The Privy Council had this to say :

"... It had not the effect of vesting in Canada any other or larger interest in these railways than that which belonged to the province at the time of the statutory transfer.... the Dominion took the property subject to the same obligation by which the right of the provincial Government was affected... The agreement thus made was valid , and must continue to receive effect until it has been terminated by the default of the respondent company , by the mutual consent of the parties , or by the action of a competent

> legislature... There is a great difference between giving authority to make an agreement and authorizing it to be made and forthwith carried out so as to override and destroy all private rights that may stand in its way ...
> it becomes unnecessary to decide whether... the Parliament of Canada would have had the power to extinguish the rights of th respondent company under the agreement...Whether that power is given ... to the Dominion Parliament or to the Legislature of Nova Scotia , is a question of difficulty and importance ; but seeing that it does not arise for decision in the present case , their Lordships express no opinion whatever in regard to it."

City of Montreal v. Harbour Commissioners of Montreal et al [1926] A.C.299 {22} , a Privy Council decision , held again that the relevant date of the proprietory rights in harbours being granted to the federal crown was the date of Confederation , that the portion of Montreal Harbour in question was not part of that harbour in 1867 and thus the property in the harbour remained in the provincial crown. Subsequent federal legislation was ultra vires insofar as it attempted under provisions of the B.N.A. Act other than section 108 to appropriate the property in the bed and the foreshore of the additional harbour area as statutorily designated. It held that there was no distinction between a harbour in a river that was merely navigable and a harbour that was tidal. It held again that property in the foreshore remained in these circumstances in the province or in its grantees.

Tobias et al v. Nolan 71 N.S.R.(2nd) 92 {23} , an interesting case concerned with the control and ownership of the mysterious Oak Island , decided at the trial level by Macintosh , J. , held that the foreshore and the adjacent seabed on a seaside property was the property of the Crown and impliedly decided that it was the provincial Crown since it held that the provincial government's construction of a road in that area was appropriate and legal. The trial judge was upheld on appeal on this point , inter alia , by the Nova Scotia Supreme Court appeal division in Tobias et al v. Nolan S.C.A. No.01615 [24]

The Meaning of "Public Harbours" in the Third Schedule to the British North America Act , 1867 41 C.B.R. 519 [25] , a 1963 article by G. V. La Forest , deals extensively with the ownerships of harbours in Canada and its conclusions that the subject is often a murky one and therefore " The agreements with British Columbia and Ontario...afford businesslike solutions to many of the problems concerning the extent of public harbours and the nature of the Dominion's interest in them. It is highly desirable that similar agreements be entered into with the other provinces. "

The Board has read some other cases subsequent to Professor (as he then was) La Forest's article. The Appeal Court of Newfoundland in Reference Re Mineral and other Natural Resources of the Continental Shelf (1983) 41 Nfld.& P.E.I. R. 271 [31] , the Supreme Court of Canada in two cases Re Attorney-General of Canada and Attorney -General of British Columbia et al (1984) 8 D.L.R. 161 [32] and Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland (1984) 5 D.L.R. 385 [33] , the Legislature of Nova Scotia in the Canada-Nova

Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act C.3 S.N.S. 1987 do , none of them , derogate from the principle that the province of Nova Scotia has prima facie jurisdiction over its foreshore .

Volume

6B 2

MUNICIPAL BOARD DECISIONS

VOLUME SIX-B/1987

Part 2. (pp. 453-827)

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

CHAIRMAN: R.H. BLOIS, Q.C.
Until June 30, 1987
MICHAEL G. JOHNSON, C.A.
From September 14, 1987

VICE-CHAIRMAN: ELIZABETH SALTON
Until September 14, 1987
LINDA GARBER, LL.B.
From October 21, 1987

MEMBER: RICHARD L. WELDON

TERM O.I.C. APPOINTMENTS: R.H. BLOIS, Q.C.
July 1, to December 31, 1987
ELIZABETH SALTON
September 15, to December 31, 1987

****

DOREEN FRIIS — Clerk

CLYDE A. PAUL, LL.B. — Counsel

THIS VOLUME CONTAINS ALL PLANNING, MUNICIPAL BOUNDARY AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1987, TO DECEMBER 31, 1987.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

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THIS VOLUME OF THE 1987 DECISIONS OF THE NOVA SCOTIA MUNICIPAL BOARD CONTAINS HEADNOTES WHICH SUMMARIZE THE DECISIONS. THESE HEADNOTES ARE NOT PART OF THE DECISIONS. THE MUNICIPAL BOARD WHILE IT HAS AUTHORIZED AND APPROVED OF THE PUBLICATION OF THESE HEADNOTES ASSUMES NO RESPONSIBILITY FOR THE CONTENT OR THE ACCURACY OF THE HEADNOTES.

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PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-2 TO R-3--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--MUNICIPAL BOARD ACT, SS. 16(1), 29 --PLANNING ACT, SS. 43(1), 51(1), 60(1), 63(1),(2),(3),(4),(5)--CITY OF SYDNEY MPS, SECTIONS 7.1.4, 7.4.1, 7.5.1, 8.5

This is an appeal by J.D. as applicant from a decision of the Council of the City of Sydney refusing [as a result of a motion that passed, but with an insufficient majority] to rezone approx. 1.49 acres of land on Alexandra St. from Residential (R-2) to Residential (R-3) to provide for apartment housing. The Director of the Cape Breton Metropolitan Planning Commission recommended approval of the proposed rezoning. The lands are presently undeveloped and wooded, abut the Membertou Indian Reserve, and are within the City's Municipal Planning Strategy (MPS).

HELD: The appeal is allowed and Council is instructed to rezone the subject lands from R-2 to R-3.

The City argues that public opinion as expressed to Council was unanimously against the rezoning, and that this Board ought not to follow its earlier decision in Ranni. The Board is not bound by its previous decisions but ought to follow them when possible. Some degree of consistency, and thus certainty, must be the goal. The City argues that the MPS merely empowers Council to consider rezoning and that it is not imperative for Council to rezone every time a proposal conformed to the MPS. The Board is unable to find any distinction between this case and the one approving a rezoning to R-3 in Ranni. There is opposition to the proposed development by the Membertou Band Council, but there appears to be no intent in the MPS to treat the inhabitants of the Reserve in any special way or to utilize the MPS to promote better Indian/non-Indian relations. The Reserve will be buffered from the proposed development, and so there will be no unwarranted intrusion into the residential area of the Reserve. The opposition of the inhabitants of the Reserve cannot be a determining reason in the Board's decision. While Council may give consideration to the opinions of residents, it must, as the Board said in Ranni, make its decision based on reasonably carrying out the intent of the MPS. The City advanced no reasonable basis within the intent of the MPS for resisting the proposal.

NSMB-567-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF : The Planning Act , S.N.S., 1983 , Chapter 9 ;

- and -

IN THE MATTER OF : An appeal by **JOHN DALTON** from the decision of the City Council of the **CITY OF SYDNEY** made on January 22nd , 1987 to reject a request to amend the City's Land Use By-Law by re-zoning certain lands situated on Alexandra Street , Sydney from Residential (R-2) to Residential (R-3).

BEFORE : RICHARD L. WELDON , Member

COUNSEL : PATRICK MURRAY , LL.B.
, for the Appellant ,
JOHN DALTON

MICHAEL G. WHALLEY Q.C. ,for
the CITY of SYDNEY

DECISION

Pursuant to Section 16 (1) of **CHAPTER 9 , S.N.S. 1981 , THE MUNICIPAL BOARD ACT ,** The Chairman assigned Board member Richard L. Weldon to hear this planning appeal at the Board's June 9 , 1987 sittings at the Council Chambers of the City of Sydney , 320 Esplanade , Sydney N.S . [The City of Sydney will hereinafter be referred to as the City]

The Notice of Appeal was dated February 9th , 1987 , was served by prepaid courier on the Board on February 10 , 1987 and was signed by Guy LaFosse as counsel for the Appellant JOHN DALTON. The Board assigned the Chairman to peruse this Notice of Appeal to determine whether or not the Notice of Appeal complied with the Planning Act S.N.S., 1983 , Chapter

9 and the Rules made thereunder as to the form and content of an appropriate Notice of Appeal . The Chairman made no request to the Appellants to amend the Notice of Appeal which was acompanied by an undertaking made on behalf of the Appellants to pay the costs for advertising the Notice of Hearing . The Chairman did , however , by a letter to Mr. LaFosse dated February 12 th , 1986 request that he , in a reasonable time before the hearing , deliver to the City some particulars " of why the Appellant thinks that the Council's decision does not reasonably carry out the intent of the Municipal Planning Strategy...".

The Notice of Appeal gave two grounds of appeal:

" (1) THAT the decision of Council does not reasonably carry out the intent of the municipal planning strategy.

(2) THAT the Council erred in not following the recommendation of the Cape Breton Metro Planning Commission that this application be approved."

The Appeal seeks to have the Board reverse the decision of the Council of the City (hereinafter referred to as the Council) made on January 22nd , 1987 rejecting a request of John Dalton , herein also referred to as the Appellant , to amend the Land Use By-law (hereinafter referred to as the LUB) of the City " by amending the area of land [owned by the Appellant] on Alexandra Street, Sydney, Nova Scotia, ... from Residential (R-2) to Residential (R-3)."

The appeal came on for hearing at 10.00 A.M. on June 9, 1987 at Council Chambers of the City , 320 Esplanade pursuant to the Notice of Hearing dated the 1st day of May A.D.1987. The Board heard evidence for two days and took a view of the site after the evening adjournment of the first day of the hearing .

These excerpts from Planning Act sections bear on this appeal :

> " 63 (1) The ...refusal by a council to amend the land-use by-law may be appealed by
>
> ...
>
> (b) the applicant ;
>
> ...
>
> (2) An appeal filed pursuant to subsection (1) shall be served on the Board... in the case of a refusal within twenty-one days of the date of the decision of the council.
>
> (3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.
>
> (4) The Board may
>
> (a) confirm the decision of the council ;
>
> (b) ... ; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the Board determines that the decision of council cannot reasonably be said to carry out the intent of the municipal planning strategy."

Service of the Notice of Appeal , the Notice of Hearing, and advertisment of the Notice of Hearing were all proven to the satisfaction of the Board. The Board (noting that the Appellant was an applicant to council disatisfied with the refusal decision received), with the consent of all counsel, therefore assumed jurisdiction to hear this appeal.

The Appellant testified himself and caused to be called as witnesses James MacArthur , David Graham, Charles Hopkins, Alderman Robert Crane and Douglas Foster . John Paul gave evidence representing himself to be an authorized spokesperson for the Membertou Indian Band many of whose members inhabit the Membertou Reserve , an Indian Reserve located within the City's boundaries. Harold Anderson gave evidence on his own initative to the Board. The City caused to be called Alderman Charles Palmer .

The land of the Appellant which he applied to Council to rezone is the residue of an old subdivision formerly owned by the University College of Cape Breton graphically shown before the Board on a plan of the same made by John S. Pope N.S.L.S. December 7, 1986 the plan ("no scale factor being applied") being introduced as Exhibit D-24. The total land ownership of the Appellant is shown as outlined in red on the plan. That portion of his ownership he has applied to rezone is outlined in red on the plan except for its southernmost boundary which is marked in blue. The area to be rezoned is also cross-hatched in blue on the plan and consists of a Street reserve approximately 50' in width and running south-easterly from the south-east side of Alexandra Street (a public street in the City) 508.40' along the entire northerly boundary of the land to be rezoned , a street reserve of the same width running southerly in a straight line 200' from the southern boundary of previously mentioned street reserve at its intersection with the northern end of the south-eastern boundary of lot 10 , and lots 8 , 9, 10 , 11 , 45 , 46 , 47 and 48 of the " old subdivision " . Many of these old lots are 50'x 100'and all of them are of that approximate size

(Since there is no scale specified for the plan it is difficult to be more precise in description unless a dimension for a boundary is drawn on the plan of the subject lands.). According to the the post-hearing memorandum filed by Mr. Murray , these lands contain about 1.49 acres.

The frontage of the subject lands on Alexandra Street consists of the 52.40' road reserve frontage first above alluded to. This is the only frontage the subject land appears to have on a developed public street in the City .

The subject lands have a straight line northerly boundary and are abutted by a strip of land in the ownership of others which varies in width at its north-westerly end on Alexandra Street of 24.44' and on its south-easterly end at the St. Peter's Road Reserve approximately 13.5'. This narrow strip of land is marked on the plan " Formerly Murdock Morrison ". Just north of this narrow strip of land is what appears both on the plan and on the ground to be a public street marked and signed " Membertou Street ".

The south-easterly straightline approximately 250' long (and final) boundary of the subject lot is abutted south-easterly by some sort of a highway reserve shown on the plan as " St. Peters Road Reserve ". On the south-easterly boundary of the St. Peters Road Reserve lies the Membertou Indian Reserve a large area shown outlined in blue on Exhibit D-25 which purports to be a plan of the Reserve and shows as well the area of the subject lands.

On its irregular southernmost boundary (3 different courses) the subject land buts on Lots 1 , 5 , 6 , 7 , and the the northernmost boundary of another 50 ' road reserve. This road reserve is owned by (claimed by) the Appellant. Lots 3 , 6 , and 7 appear to be in the ownerships of others.

The Appellant John Dalton , a resident of Sydney since 1985 , said he purchased a large block of land zoned R-2 which included the subject land and proposed to build , subsequent to the successful rezoning of the subject lands , 2 eight unit apartment buildings for a total of 16 units on the subject land. He admitted that, after rezoning, as-of-right , he could put 32 residential units on the subject land without street closings and up to 60 residential units with street closings. He further pointed out that within the present R-2 zoning he estimated he could, as-of-right (after construction of the dedicated streets) put in at least 22 residential units without further subdivision approvals. He said that R-3 zoning would allow economical development of a difficult piece of land which could not , because of its topography , be brought to its full rational economic development without the requested rezoning. He felt that the most economical way for him to develop the subject land after rezoning would be to have the dedication of some of the internal street allowances cancelled and to gain the necessary street access to his proposed development through a street extension northerly to Membertou Street across the narrow intervening strip of land he did not own and to make this route his route for the in ground services as well as for surface traffic. In this scheme he would tap into the water and sewer systems already installed under the paved surface of Membertou Street. He said he was unable to get access across the intervening lands to Membertou Street . Neither was he able to obtain permission to avail himself of access to the sewer and water services buried in Membertou Street since both seemed to be " Indian lands " and not under the jurisdiction of the City except by contract between the city and the federal Department of Indian Affairs. Even without development access to Membertou Street , Mr. Dalton believed that he could develop his proposal in a satisfactory , if less economic, way through using Alexandra Street for the proposed development's access and servicing.

Mr. Dalton felt the building of his project would alleviate some severe drainage problems in the general neighbourhood because he would have to drain the swampy area towards the north-eastern portion of the subject lands.

With such information as he could obtain Mr. Dalton believed there was a demand in the City for the type of residential housing which he proposed in his development.

Mr. Dalton believed that his proposed development fully met the intent of the City's Municipal Planning Strategy (MPS).

Mr. Dalton approached the near neighbours of his proposed development and could detect no hostility in them towards it. Mr. Dalton said that at the Council's Planning Advisory Committee (PAC) meeting there was little opposition to his proposal. He said at the public hearing ordered by Council there were only two residents who spoke against his proposal and hardly anybody else in the Council Chambers at that time opposed his proposal. At the deciding Council meeting on January 29 the Council Chambers were filled with persons for whom Mr. John Paul was the spokesperson. These persons were opposed to the proposed development. The requested rezoning passed , but with an insuffcent majority for it to be effective under the Planning Act s.60 (1) , 51 (1) , 43 (1).

According to Mr. Dalton , Mr. Paul and Mr. Dalton had negotiations concerning the issues which impeded the successful attainment of their disparate goals. They discussed the entrance of Mr. Dalton's development onto Membertou Street and the use by Mr. Dalton of the services installed therein , the purchase by Mr. Paul's constituency of Mr. Dalton's land for addition to the Indian Reserve. These negotiations did not result in any agreement.

James MacArthur , an official from the provincial Department of Housing , testified there was in his view a need for more R-3 zoned land for development in the City. He questioned the accuracy of the published residential apartment vacancy rates in the City available from various government departments and believed the sometime quoted vacancy rate of 7% was much too high. He felt the proper vacancy rate would not exceed 2%.

Paul Graham , P. Eng. , was qualified to the satisfaction of the Board as an expert in the engineering of land developments and thus entitled to give opinion evidence concerning land development engineering matters in the City. He held the opinion that there would be drainage problems encountered in the proposed development of the subject lands. He held the opinion that there were engineering solutions to correct those problems which the proposal would include. He passed his opinion without regard to the legal restrictions as to zoning.

Charles Hopkins , employed by the Cape Breton Regional Assessment Region , felt that in modern times the construction of R-3 type of apartment houses did not detract from the assessment values of adjacent homes .

Robert Crane is one of the aldermen representing Ward 4 of the City . He attended the public hearing on the Appellant's proposal held on January 22. He was in favour of the proposed development and formed part of the insuffiicent majority which voted for the proposal.

Alderman Crane said he listened to and considered the views of all people who made representations to the Mayor and Aldermen. He said he considered the City's need for more R-3 zoned land for residential apartment construction. He studied carefully the report tendered to the Council from the Metro Planning Commission. He made himself familiar with the City's MPS . He went to check out the site personally. In his opinion there were more considerations in favour of the rezoning than were against it. Thus he voted for the resolution to amend the LUB as requested by the Appellant.

Alderman Crane does not believe that the MPS allows that the " concern of the residents should be the main concern " in considering an application to rezone .

The subject lands are not within the City Ward for which Alderman Crane was elected one of the aldermen .

Douglas Foster , Director of the Cape Breton Municipal Planning Commission , was qualified as an expert in planning entitled to give opinion evidence concerning planning matters as they affect the City . He is responsible for the report to Council favouring the proposed development from the Cape Breton Municipal Planning Commission. He reviewed the City's MPS as it affected the proposed development and said that the City's decision was , in effect , a refusal decision and that a refusal decision on the present proposal by Council was a decision contrary to the MPS. He further expressed the opinion that a decision by Council in favour of the proposed rezoning would be in accord with the MPS.

John Paul , at his request , was sworn and gave evidence in the hearing. Mr. Paul is the Band Planner for the Indians resident on the Membertou Reserve. He said he was both knowledgeable as to Band affairs and authorized by the Band to speak at this hearing on its behalf. He said the inhabitants of the Reserve strongly resist being assimilated into the City. Thus they wish the Reserve kept separate from the City's residential developments. Mr. Paul said that the subject lands have been undeveloped and wooded up to the present time and serve as a buffer between the houses on the Reserve and the houses in the surrounding City specifically those houses in the City which obtain access through Alexandra Street. Mr. Paul said the Indian band living on the Membertou Reserve wish this buffer to continue unchanged by any development such as that proposed by the Appellant on the subject lands.

Mr. Paul said that there was overcrowding currently on the Reserve and that recently 49 acres of land had been purchased to add to the Reserve. Mr. Paul said that the negotiations to purchase the subject lands from the Appellant had fallen through. He felt that (if it could be stopped) Mr. Dalton would be granted no access to Membertou Street or to the services buried in the Street. Mr. Paul said all the usual City services are performed in respect of, or on , the the Reserve by the City are performed under the terms of contracts between the City and the Department of Indian Affairs.

Mr. Paul said he had fully canvassed the views of his band members and the great majority opposed the proposed rezoning. He said many of those same band members attended the Council meeting where the proposed rezoning was " refused " and he had acted as the sole spokesperson for the Band at that meeting.

In response to a question from the Board , Mr. Paul said that he could not , himself , grant the Board permission to go onto the Reserve in the course of its enquiry. He would have to get permission from the Band Council. No such permission (necessary or not) was forthcoming.

Harold Anderson gave evidence on his own behalf. Mr. Anderson is the proprietor of a corner store on the westerly side of Alexandra Street nearly opposite the mouth of Membertou Street where it meets Alexandra Street. Much of his trade in his store is with the inhabitants of the Reserve. Mr. Anderson detected a concern among the population of the Reserve that the proposed rezoning and subsequent development will affect the quality of life of those who live on the Membertou Reserve. Mr. Anderson said that the Indian community was satisfied with the results of the " refusal " decision of Council. He felt that a reversal of that decision would make the Indian community have a concern for its Reserve boundaries and he was " afraid the effect [of such reversal by the Board would have] on Indian ... non-Indian relations."

Alderman Charles Palmer , one of the two City alderman for Ward II (the Ward in whch the subject lands are located) was the sole witness for the City. Alderman Palmer stated that the wishes of the people in the area were against the proposed rezoning and that these wishes were the main determinate in his mind. He believed that the MPS was made flexible in regard to changes in residential zoning so that Council would have freedom to choose whether or not it wished to vote for a proposed change without needing a prior change in the MPS. Alderman Palmer felt that this freedom to apply for a change of zoning was being interpreted by the Board in previous cases in the City as a right to the rezoning regardless of the wishes of the majority of the voters who showed an interest in the development in question. At all odds , Alderman Palmer felt that the Board should not interfere with the decisions of Council which resulted from Council following " the will of the people ".

If the Board continued its interference with Council acting in such a mode , then Council would have to change the MPS (with , of course , the consent of the Minister) to prevent such unwarranted interference by the Board.

At this termination of the evidence taking portion of the hearing , both counsel engaged in oral argument . At the conclusion of oral argument , arrangements were made for the production by each side of post-hearing memoranda on or before June 26 ,1987. Mr.Murray's was received by the Board June 30 , 1987. Mr. Whalley's memorandum was received by the Board on July 30 , 1987.

Mr. Whalley conceded in argument , and the Board agrees with him (and has previously decided in Oakdene Estates Limited v. Municipality of the County of Halifax NSMB-526-86-P) , that a motion by a council passed with an insuffcent majority is properly categorized as a refusal decision under s. 63 of the Planning Act and is appealable as such.

Mr. Whalley most strongly advocated that a previous Board decision , David Ranni v. City of Sydney NSMB-551-86-P , made by a one person board consisting of the then Chairman Robert H.N. Blois , Q.C. was wrongly decided and that this Board should decide this appeal disregarding the Ranni decision. Mr.

Whalley is correct when he states that this Board is not bound by its own previous decisions. The statutory direction to file written decisions (see s.42 (1) of the Municipal Board Act) must be , at least , some indication that the Board , as well as others , should have a knowledge of those previous decisions and should thus be protected against making current decisions in ignorance of the content of previous decisions on the same or similar topics.

In his written memorandum , Mr. Whalley argued that in the present case public opinion as expressed to Council was unanimously (with the exception of Mr. Dalton) against rezoning whereas , in the Ranni case , public opinion as expressed to Council was more mixed and that the Ranni case should be distinguished from the present case on that fact alone. The present Board did not have Mr. Whalley's advantage of being present at the full planning proceedings of both the Ranni case and of the present case. The present Board had nothing to do with the Ranni case (except read the completed decision) and in the present case , of course was only engaged in those parts of the planning proceedings which properly came before it. On this point , the Board notes that that Mr. Dalton has testified that the persons most directly affected by his proposed development did not express to him negative opinions (when he solicited their opinions) and they certainly did not appear before the Board to protest the development even though , under the Board's usual process, they must have been exposed to the Notice of Hearing both from the newspaper advertisments and delivery of notice to their door by mail. Thus the Board is lead to believe that public opinion concerning the present proposal was not , in fact , so one sided as Mr. Whalley's argument would make it.

Regardless of the relative balance of public opinions expressed before the respective Council's in the Ranni public hearings and in the public hearings held in regard to the present proposal , the Board is of the opinion that such distinction , if it exists , is no sufficent grounds to eliminate Ranni as a persuasive guide in helping the Board to arrive at its decision in the present appeal.

In that respect , the Board (however it may be constituted in a given case) ought to aim to be informed of previous Board decisions always giving them effect to the extent they are applicable to the circumstances at hand and following them when possible. In order to deviate from past decisions of the Board with facts similar to the case at hand , the current Board ought to see that the previous Board was in error in some manner that can be logically and clearly put to paper.

Some degree of consistency , and thus certainty , in the application of the statutes the Board has the duty to apply, must be the goal .

Mr. Whalley is strongly of the opinion that the Blois Board in Ranni made the type of error which would allow the Board here to disregard that decision. Mr. Whalley said that , in Ranni , Chairman Blois took the MPS 's " mere empowering " of Council to consider rezoning as an imperative on Council to rezone everytime when requested by an applicant whose proposal to rezone conformed to the MPS's requirements for rezoning. Mr. Whalley took the position that the right to consider was just that , a right to consider , and that once it had considered all relevant considerations Council could come to either of two decisions " Yes " or " No " with total freedom . In this particular case , Council decided " No " and the Board should confirm that result disregarding the Ranni decision, if necessary, to arrive at that result . In essence that is how the Board understands Mr. Whalley's argument.

Mr. Murray in his oral argument relied heavily on the Ranni decision , said that (except as to site location) it was an identical case to the present appeal , and should most heavily be taken into consideration by the Board. In his post hearing memorandum Mr. Murray made the following arguments:

> "The appellant ... submits that the decision of Council does not reasonably carry out the the intent of the MPS ... . The expert planning report... indicates that the proposed zoning meets the intent of the MPS and this report was not rebutted at the hearing [by a contrary planning report?].
> ... In conclusion of Mr. Foster's evidence when asked if Council's decision could reasonably be said to carry out the intent of the MPS ,...[his] answer was that it did not. ...The Appellant submits that based on...[the]Ranni [decision] ... the Council must make its decision on sound planning principles and not merely the wishes of the residents in the area."

The Board has read the MPS of the City in order to determine its intent and Schedule A to this decision contains those portions of the MPS (EXHIBIT D-14) which , in its opinion , have some direct bearing on the issues of this appeal.

Begging for the moment the proven opposition of the Membertou Band Council to this proposed development , the Board is unable to find that there is any distinction which would militate against its approval by the Board (except the obvious one of site) between this rezoning and the one approved by the Board in the recent decision in Ranni.In fact Ranni was a " weaker " case then the present appeal. In Ranni the zonal jump was broader (R-1 to R-3) whereas the zonal jump in this appeal is only R-2 to R-3. Many of the citizens opposed to the proposed rezoning in Ranni lived in houses in much closer proximity to the lands being rezoned than are the most of the rezoning opponents here. In the Ranni decision Council decided the rzoning issue by majority vote which , at the time it was made , was of a sufficent majority to dispose of the application by a refusal. In the present case , as has been noted , the majority of a quorum of Council voted in favour of the rezoning , albeit in numbers which amounted to an implied refusal of the rezoning.

Begging the same question , Mr. Whalley has not persuaded the Board that the Board has any proper grounds here for diregarding the decision in Ranni.

Again begging the question , the Board has read Ranni and agrees with the reasoning of the Chairman therein contained. So , apparently , did a majority of the quorum of Council in their deliberations of this present rezoning.

Now to the question already begged three times. Can the intervention of the Membertou Band Council be a decisive factor to influence the Board in determining the intent of the MPS and then testing the decision of Council against that MPS ?

The Board was impressed by the evidence of Mr. Anderson when he expressed the opinion that he was concerned that a rezoning decision which contradicted the wishes of the Membertou Band Council would be detrimental to Indian non-Indian relations in the City. Assuming his opinion is correct , could this Board take that factor into account ? The Board has read the City's MPS in its entirety and , other than the presence of the " Indian Reservation " on the various maps and the short notes concerning the Reserve alluded to in Schedule A of this decision , there appears to be no discernable intent in the MPS to treat the inhabitants of the Reserve in any special way or to utilize the MPS of the City for the better promotion of Indian/non-Indian relations.

Thus those inhabitants of the Reserve are entitled to have their views heard both at Council and before this Board in the same manner as the views of any other City citizens but with no special considerations supported by specific intents contained in the MPS.

The Board notes that the nearest inhabitants on the Reserve to the proposed development will be buffered from the proposed development by the width of the St. Peters Road Reserve which is now treed and about 200' wide. In the view of the Board this is sufficent buffering for the few houses on the Reserve which are apparently near the boundary of the Reserve closest to the subject lands. Because of this buffering there will be no unwarranted intrusion by the proposed development into the residential area of the Reserve.

A rezoning permitted in this case could frustrate the land development and land acquistion objectives of the Membertou Band Council that were discussed in evidence before the Board. The suitability or non-suitabilty of those objectives are of no proper concern either to the Council or the Board when trying to act within the constraints of the MPS.

Thus the Board has found that the opposition of the inhabitants of the Reserve to the proposed rezoning can be no determining reason, found within the context of the MPS, which would allow the Board to give relief to those inhabitants from a decision which they may perceive to be inimical to their interests.

The Board can only repeat what Chairman Blois said in Ranni :

> "... while it is relevant and proper for the council to give consideration to the opinions expressed by residents the Council must make its decision based on reasonably carrying out the intent of the M.P.S. While the Council is not under any obligation to accept the recommendation of its own staff or that of the Cape Breton Metro Planning Commission...it nevertheless is obliged to consider the application in relation to the intent of the M.P.S. and if Council does not agree with the recommendation of...staff it should have some reasonable basis for so doing based on the intent of the M.P.S.and not on the opinions of some of the residents of a particular area of the City where the proposed development is to take place."

From the evidence in this appeal it appears that the opinion of the planners was that the proposal was within the intent of the MPS and that the implied refusal decision of

Council was not. The City could advance no reasonable basis within the intent of the MPS for resisting the proposal except the objection of many citizens, mostly resident in the Reserve. As pointed out in Ranni council needs more than that to justify the refusal to approve the present proposed rezoning.

The Board therefore finds, pursuant to s. 63 (3) of the Planning Act, that the decision of Council impliedly refusing to rezone the lands of the Appellant according to his proposal does not reasonably carry out the intent of the MPS. Under s.63 (5) of the Planning Act the Board considers itself empowered to allow the appeal. Under s. 63 (4) (c) the Board allows the appeal and instructs the council to amend its LUB by rezoning the subject lands of the Appellant which the Appellant had applied to Council to rezone from R-2 to R-3 as proposed by the Appellant.

Pursuant to s.29 of the Municipal Board Act an order shall issue accordingly.

Dated at Halifax, Nova Scotia, this 31 day of July, 1987.

RICHARD L. WELDON

MEMBER

SCHEDULE A

EXTRACTS FROM SYDNEY MDP (MPS)

7.1.4 Residential Policy

... the City can expect only modest residential development...Limited infilling will continue to take place along with a small amount of development in higher cost privately developed subdivisions.

Objectives

It shall be the objective of the council...to encourage suffcent good quality housing in a broad range of housing costs and tenure situations ...by:
1) the opening and servicing of land in a systematic fasion as required ;
...
3) Encouraging high density development in areas with appropriate amenities , sewrvices and recreational facilities ; ...

Policies

4) It shall be the policy of council to zone existing low density residential areas as well as future residential areas in a low density residential zone and to consider zoning amendments to permit medium density multiple-family housing in any of the areas designated as residential or future development on ...Map #4 to a maximum density of 40 units per net acre subject to the considerations ... in Policy 8... .

7.4 Constraints to Development

7.4.1 Background

Some areas of the City ... subject to flooding ...are designated on Map #2 " Constraints to Development "...

[the subject land is not so designated]

7.5.1 Comprehensive Development District

...

Glebe Lands ... area behind the Indian Reserve...Some time ago negotiations had taken place between the City and the Membertou Band Council to develop a 40 acre parcel of land directly behiiind the existing reservation. For whatever cause , the development did not materialize....

Policy 8 is a check list of the necessary qualifications for rezoning which may be observed in Exhibit D-14 and which the Board will not reproduce here in the interests of brevity and further because the uncontradicted evidence before the Board is that these requirements have all been met .

8.5 Area - Between Alexandra Street and Rotary Drive

Objectives

...

2) The primary function of the area shall be residential of varying densities...

Laba et al. v. Town of Kentville

PLANNING-ZONING AMENDMENT--APPROVAL OF REZONING FROM R-4 TO R-1, R-3 AND P--WHETHER AGGRIEVED PERSON--WHETHER REASONABLY CARRIES OUT INTENT OF MPS --MUNICIPAL BOARD ACT, S. 16(1)--PLANNING ACT, SS. 60(3), 63(1),(2),(3),(4),(5)--TOWN OF KENTVILLE MPS, POLICY K-4

This is an appeal by a number of residents as aggrieved persons from a decision of the Council of the Town of Kentville rezoning approx. 40 acres of land, forming a portion of McDougall Heights Subdivision and situated on the south side of Park St. (Highway No. 1), from Residential Rural (R-4) to, in part, Residential Single Family (R-1), part Residential Multiple Family (R-3) and part Park and Open Space (P) Zones. The Town took the position that none of the Appellants was an aggrieved person. The subject lands are closely linked to the existing Glenwood Subdivision.

HELD: The Board allows the appeal and reverses the decision of Council.

The Legislature extended the definition of aggrieved persons effective Aug. 1, 1987. Anyone who qualified before the amendment qualifies under the present legislation, and the Board looks to this test first (the amendment came into effect after all evidence and submissions had been made). The fact that Dr. Laba's wife is the registered owner of the residence near the subject lands (the wife is not an Appellant) does not mean he is incapable of being an aggrieved person: he is an owner and is capable of suffering economic injury. The Board accepts his uncontradicted evidence that the value of his residence would be somewhat diminished as a result of the decision of Council. Since Dr. Laba qualifies as an aggrieved person there is no need to make findings in relation to the other Appellants.

The Board accepts the opinion of the two planning experts that the existing residential development will be buffered. The Board is concerned about the extra vehicular traffic in Glenwood Subdivision but cannot say this will violate any provision of the MPS. However Policy K-4A of the MPS incorporates the subdivision regulations, in particular reg. 11(b)(ii), and this destroys the use of the street proposed as a collector street for this new development because it is not of proper width. This street could only be used after rather expensive expropriations, and neither the developer nor the Town have any present intention of so spending. The decision does not reasonably carry out the intent of the MPS.

Application for Leave to Appeal was made to the Supreme Court of Nova Scotia, Appeal Division, by the Town of Kentville. The application was granted. The Appeal Division ordered that the appeal be dismissed.

NSMB-557-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An appeal by JOHN P. LABA, E. SCOTT MCCLELLAN, BRENDA MCCLELLAN, RICHARD S. CAIN, and JUDITH CAIN from the decision of the Town Council of the TOWN OF KENTVILLE made on October 8th, 1986 to amend Schedule A Zoning Map of the Town's Land Use By-Law by re-zoning certain lands situated on the south side of Park Street, intended to be lands now or formerly owned by AUBURN INVESTMENTS LIMITED and also known as McDougall Heights Subdivision from Residential Rural (R-4) to Residential Single Family (R-1), Residential Rural (R-4) to Residential Multiple Family (R-3) and Residential Rural (R-4) to Park and Open Space (P) Zone.

BEFORE: RICHARD L. WELDON, Member

COUNSEL: KENNETH BAIRD and EDGAR DOULL, on behalf of the Appellants, JOHN P. LABA, E., SCOTT MCCLELLAN, BRENDA MCCLELLAN, RICHARD S. CAIN, AND JUDITH CAIN;

ALAN TUFTS, LL.B., on behalf on the Town of Kentville;

PETER MUTTART Q.C., as a principal of AUBURN INVESTMENTS LIMITED, the Applicant before Town Council for the rezoning.

DECISION

Pursuant to Section 16(1) of CHAPTER 9, S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board Member Richard L. Weldon to hear this planning appeal at the Board's March 10, 1987 sittings at the Council Chambers of the Town of Kentville, Cornwallis Street, Kentville, N.S. [The Town of Kentville will hereinafter be referred to as the Town].

The Notice of Appeal was dated November 3rd, 1986, was served personally by Peter C. Griffiths, then counsel for the Appellants, JOHN P. LABA, E. SCOTT MCCLELLAN, BRENDA MCCLELLAN, RICHARD S. CAIN, and JUDITH CAIN on the Board on November 5th, 1986. The Board assigned the Chairman to peruse this Notice of Appeal to determine whether or not the Notice of Appeal complied with the Planning Act, S.N.S., 1983, Chapter 9 and the Rules made thereunder as to the form and content of an appropriate Notice of Appeal. The Chairman made no request to the Appellants to amend the Notice of Appeal which was accompanied by an undertaking made on behalf of the Appellants to pay for the costs of advertising the Notice of Hearing.

The Notice of Appeal cited as the basis of the appeal Section 63(1) of the Planning Act.

The Appeal seeks to have the Board reverse the decision of the Town Council (hereinafter referred to as the Council) of the Town "signed" on October 8th, 1986 to amend Schedule A Zoning Map of the Town's Land Use By-Law by re-zoning certain lands situated on the south side of Park Street, intended to be lands now or formerly owned by AUBURN INVESTMENTS LIMITED and also known as a portion of McDougall Heights Subdivision from Residential Rural (R-4) to Residential Single Family (R-1), Residential Rural (R-4) to Residential Multiple Family (R-3), and Residential Rural (R-4) to Park and Open Space (P) Zone.

The decision of the Council was advertised by publication in the "Advertiser", a local newspaper published in the Town on October 17, 1986.

The appeal came on for hearing at 10:00 A.M. on March 10, 1987 at Council Chambers of the Town of Kentville, Cornwallis Street, Kentville, N.S., pursuant to the Notice of Hearing dated the 18th day of February, A.D., 1987. The Board heard evidence for five days and took a view of the site the day following the last day of taking of evidence.

Service of the the Notice of Hearing, and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board.

These excerpts from Planning Act (as it was then in force) sections bearing on this appeal bear quoting here:

> "Section 63(1) The amendment, ... by a council [of] ..the land-use by-law may be appealed by
>
> (a) an aggrieved person;
>
> (2) An appeal filed pursuant to subsection (1) shall be served on the Board within twenty-one days of the date of the publication of the advertisement required under subsection (3) of Section 60 ...
>
> (3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.
>
> (4) The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending ... the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the Board determines that the decision of council cannot reasonably be said to carry out the intent of the

> municipal planning strategy."
>
> "Section 60(3) Upon the passing of a by-law amending a land-use by-law, the council shall give notice of its passing by an advertisement in a newspaper circulating in the area affected ...."

In order to succeed in having this appeal heard on its merits, one or more of the Appellants must qualify as an "aggrieved person". If and when one of the Appellants so qualifies, the Board may then proceed to dispose of the appeal on its merits. Mr. Tufts took the position (his latest submission was undated but received by the Board May 4, 1987) that none of the Appellants was an aggrieved person.

The Board notes in passing that a broadening definition of aggrieved person was passed by the last session of the Legislature and became effective August 1, 1987. This extended definition included the old definition of aggrieved person and added to it certain other categories of persons and bodies which might now qualify as aggrieved persons. Anyone who qualified under the former legislation would certainly qualify under the present legislation.

The Board will first test whether or not any of the Appellants qualified as an aggrieved person under the former legislation which was in effect at the time the rezoning complained of was approved by Council, at the time the Notice of Appeal herein was signed and filed with the Board, at the time when all the evidence herein was heard, at the time when the last representation was made to the Board by the parties to this appeal who took an active part in the conduct of the public hearings of this appeal, and at all other times relevant to the conduct of this appeal - except the time of the delivery of this decision.

Under the former legislation, the Board has considered this aggrieved person issue at considerable length under numerous different factual situations. The earliest decision on point is usually taken to be Riverlake Residents Association v. Municipality of the County of Halifax (1985) M.B.D. (Volume 4B) 122(1). Most decisions by the Board on point of the same issue were digested up to the time of the decision in Woodworth and Schwartz v. The District of East Hants NSMB-515-86-P (2) in that decision. The most recent decision of the Board on aggrieved persons under the former legislation is Lillian Benham v. The Town of Lockeport, NSMB-563-86-P(3). Those decisions (and the others not enumerated which were decided between Woodworth(2) and Benham(3)) seem to set out the various criteria the Board has looked to in arriving at the determination of the status of aggrieved persons as qualified appellants. The Board does not propose to re-analyze these listed decisions in any detail as it believes they have been analyzed sufficiently so that the Board appreciates their lessons and can properly take guidance therefrom.

Mr. Tufts takes objection to Dr. Laba being qualified as an appellant since it appeared that Dr. Laba's wife (with whom he resides in the residence situate near the subject land) is the registered owner of their common residence and thus Dr. Laba could not possibly suffer any injury to his property on account of the rezoning since he didn't own any property. In Woodworth(2) the male owned the land, was apparently not married to the female co-resident and co-appellant, yet the Board found both to be aggrieved persons and thus to be qualified appellants. In this case, to follow Woodworth(2), the Board would have no hesitation of equating the rights of a legal spouse to those of the traditionally lesser rights acquired from some recognized relationship other than marriage.

On the whole of the evidence regardless of the rule expressed in Woodworth(2) and in any event, the Board finds on the whole of the evidence that Dr. Laba is an owner of the residence in which he resides and is capable of suffering economic injury from the results to his ownership in his residence and thus may qualify as an aggrieved person appellant in this appeal.

Mr. Tufts then goes on to argue that Dr. Laba's evidence concerning some diminution of the value of his residence is not admissable and should be totally discounted as he has demonstrated no expertise entitling him to give opinion evidence on real estate values in Kentville and, even if he had such expertise, the evidence as to value given by him would be so self-serving as to be useless. As stated before in Arenberg v. The Town of Amherst, NSMB-508-86-P (4) at P. 9 of the filed decision:

> " The Board believes that each person is an expert entitled to give admissable opinion

> evidence concerning the value of his own home and that valuation, once admitted in evidence, must be weighed together with all other evidence concerning valuation."

The Board weighed all the evidence before it on the valuation of the property in which Dr. Laba resides (the evidence to value of Dr. Laba's house is apparently the uncontradicted evidence of Dr. Laba) and from that evidence forms the opinion that the value of his residence would be somewhat diminished as a result of the decision of Council appealed herein. Under the former legislation, Dr. Laba, being an aggrieved person, would have qualified as an appellant entitled to have his appeal heard on its merits. If the present legislation now governs this appeal, for the reasons set out above, Dr. Laba would also be a qualified appellant.

Others of the signatory appellants may well have been qualified appellants as well. Since the Board has found Dr. Laba to be a qualified appellant, it need make no findings concerning the other signatory appellants in order to proceed to hear this appeal on its merits.

The Board therefore assumed jurisdiction to hear this appeal.

The area rezoned by the Town (herein called the subject lands) involves an approximately 40 acre lot of land zoned R-1 (single family residential), R-3 (multiple unit residential) and P (park and open space) all being rezoned from a rural residential holding zone. The 40 acres of land for which rezoning was approved was intended to be a portion of a larger block of land owned by the Applicant to the Town [hereinafter called the Applicant]. This lot is largely isolated from any developed public street although it has a 50' frontage on the north side of Park Street (Provincial Highway #1) a main arterial street of the Town. Regardless of the apparent intention of Council and of the Applicant, the evidence shows that minor portions of the rear of certain home occupied lots fronting on Park Street were included in the rezoning intentionally or otherwise, but, in the main, the intention was to rezone 40 acres of the Applicant's 200 acre block.

Phase I of the Applicant's three phased proposed development of the subject property was intended to be, in effect, an R-1 extension of the existing Glenwood Subdivision. That subdivision gains access to Park Street through a single entrance, Duncan Avenue, which branches into a "Y", about 7 lots north from Park Street by another street (not named on Exhibit L-17) making a configuration much the same as the yoke used in a slingshot. At a one lot distance east of the west margin of the Glenwood Subdivision/subject lands common boundary, the two roads forming the two arms of the slingshot are joined by Alicia Boulevard, a road in the Glenwood Subdivision, which ends on Duncan Avenue in the north and goes off the map over the boundaries of the Glenwood Subdivision as it proceeds south to link up with another subdivision. Almost all of the approximately 93 house lots in Glenwood Subdivision are sold and are built on. From the developer's point of view, Glenwood

Subdivision is essentially completed although street construction, and house construction on the western and southwestern portions of the subdivision were proceeding apace at the time the Board visited the site.

It is difficult to explain the situation of the subject lands without first describing to some extent Glenwood Subdivision with which the subject lands are very closely linked. The linkage proposed between the top of the slingshot roads in the Glenwood Subdivision to the subject lands is across two lots of the Glenwood subdivision which will allow two separate road accesses to the internal roads designed for the proposed development. These road linkages require only the development of two segments of road each one lot in length to reach the common boundary of the subject lands and the Glenwood Subdivision. Another proposed road access for the subject lands to Park Street would be over the proposed Auburn Drive which extends northerly to Park Street for some distance at a width of only 50' beyond the main boundary of the subject lands giving the subject lands their 50' frontage on Park Street before alluded to. The proposal calls for this access (called Auburn Drive) to be constructed during the construction of Phase II of the development which contains most of the multi-unit residential construction proposed. Exhibit L-17, mentioned above, graphically shows much of what is necessary for the understanding of the development, the rezoning that Council passed, the relationship of those items to the residences owned and occupied by the Appellants in the Glenwood Subdivision and on Park Street.

Mr. Baird, for the Appellants, called as witnesses John Laba, E. Scott McClellan, Richard Cain, Barry Carruthers, James Rafferty, and Ian Verryn-Stuart, all medical doctors. Mr. Baird testified himself and called Brenda McClellan, and Paul Longly. Mr. Tufts, for the Town, called Mayor Wendell Phinney, Wayne Gibbons, Councillor Marian Ross, Gerald Murphy, Maurice E. Lloyd and Councillor Doreen Taylor. Mr. Muttart took no active part in the proceedings unless first addressed by the Board, and then only to disclaim any intention to participate at the time of the Board's query.

Dr. Laba is an oral and maxial facial surgeon and he resides at 55 Duncan Avenue. The northern boundary of this lot abuts the southernmost contiguous boundary line of the subject lands where it is zoned R-1 and forms a part of Phase II of the proposal as shown on Exhibit L-17. He and his family have lived there since May of 1983. He purchased the lot to be near his work at the hospital as well as for the other more usual amenities such as proximity to schools, quality of the existing building in the subdivision, and the dead-end nature of the subdivision streets.

When the present proposal became a public issue in the Town, Dr. Laba, along with many of his neighbors, met and organized opposition to the proposal and conveyed the concerns of the neighborhood to the Council at the public hearings on the rezoning application.

Dr. Laba anticipated there would be further extensions westwardly on the subject lands of the R-1 type of development typical of the development in the Glenwood Subdivision but he had never felt that the subject lands would be developed in any multiple family use.

Dr. Laba has the opinion that the development of the subject lands as proposed would be an unwarranted intrusion by multi-unit residential development into a existing settled R-1 area, that traffic problems in the Glenwood Subdivision (already of some concern because of the topography of Duncan Street as it meets Park Street) would be greatly exacerbated by the dense development of the subject lands especially in Phase II and his general life-style would be adversely affected by the development as proposed.

On cross-examination, Dr. Laba said the deed to his house was in his wife's name.

Dr. E. Scott McClellan has lived at 400 Park Street since November of 1984 and purchased the property there in November of 1985. His property is 4 acres in extent and is located on the north side of Park Street just to the west of the Chipman Plant. The Chipman Plant property is about 50' wide and immediately to its east is the 50' width of the "Auburn Avenue" frontage of the subject lands on Park Street.

Dr. McClellan had much the same objections to the proposed development as did Dr. Laba given the different locations of their properties in respect to the subject lands.

By one map before the Board, at least, a small ravine portion of land at the rear of Dr. McClellan's lot was rezoned along with the land of the Applicant to Council. The Chipman Plant property mentioned in this decision appears now to be occupied by a Day & Ross trucking operation, perhaps a non-conforming use which is an industrial use its residential neighbors find noxious.

Dr. McClellan put the emphasis of his opposition to the proposed development on the multi-unit residential development in Phase II which would be located in close proximity to his rear line.

Brenda McClellan, co-owner of the house at 400 Park Street with her husband Dr. McClellan, stated her concerns that the rezoning reduced the value of their property. She said they would not have purchased the property had they known that the proposed Phase II would have been constructed near the rear of their property.

Mrs. McClellan spelled out in her evidence her participation in the neighborhood action against the proposed development before Council and in preparation for the present appeal.

Dr. Richard Cain, the next witness, lives in his house at 434 Park Street three lots from Dr. McClellan. Dr. Cain felt the proposed development would result in a devaluation to some extent in the value of his house. His views as to the proposed development, from his perspective, coincided with the views expressed by the witnesses preceding him at the hearing.

On cross-examination he stated that, prior to purchasing his house, he made no inquiry into the Town's Land Use By-law (LUB).

Dr. Donald Barry Carruthers, 1 Alicia Drive (Boulevard) Glenwood Subdivision (the street mentioned before which links the two arms of the slingshot) spelled out the calm approach he said the neighbors used in expressing their concerns to Council and in their preparation for the Council proceedings. He said the group of which he was a part studied the Town's Municipal Planning Strategy (MPS) and LUB as they affected the present proposal and then formed the opinion that Council in rezoning as it did not do so in conformity to its own laws.

Dr. Carruthers assisted in the taking of certain petitions for presentation to Council. He also solicited those petitioners for funds to prosecute the proceedings before Council and before the Board.

Dr. James Rafferty, 37 Blossom Drive, is a medical doctor and a Councillor. He discussed the details of certain other developments in Kentville designed for multi-unit residential developments.

Dr. Rafferty stated that he was concerned with the heavy concentration of multi-unit residential construction envisaged for Phase II of the proposed development. He said he had made a full study of all the arguments for and against the proposed development. He felt there was little demand in Town for the type of multi-unit housing proposed to be installed in

Phase II.

Councillor (Dr.) Rafferty believes that the proposed development does not conform to Policy K-4(a) of the Town's MPS. He voted against the proposed rezoning.

Paul Longly, 38 Duncan Avenue, testified for the Appellants. He has lived at this address in Glenwood Subdivision for 19 years. He bought his house as part of a Co-op Housing group financed by the then Nova Scotia Housing Commission. He was among the first to build in Glenwood Subdivision and he has seen the development of that subdivision over the ensuing 19 years.

Mr. Longly testified to the traffic problems that exist on Duncan Street now. He expressed his concern regarding the inadequacy of Duncan Street to handle the extra traffic to be generated by the construction and subsequent occupation of the proposed development.

Dr. Ian Verryn-Stuart testified to his dissatisfaction with Council's approval of the proposed rezoning with special reference to the problem of handling the extra traffic to be generated as a result of the proposed development at the intersection of Duncan Avenue and Park Street.

Kenneth Warren Baird, who had conducted the Appellants' case to date was examined by Mr. Edgar Doull. Mr. Baird resides at 47 Duncan Avenue, which he owns, and is a police officer. Mr. Baird, as he preferred to be called at this hearing, objected to the proposed development for the generalized reasons expressed by the other witnesses. He said that, according to his studies, the proposed development required access through a collector road 59.06' or more in width to Park Street and the only access provided in the proposal was the 50' wide access at Duncan Avenue and the proposed 50' wide access at Auburn Avenue. He said these definitions of streets came from the Town's subdivision By-law.

By agreement of the parties present, Mr. Tufts for the Town called Mayor R. Wendell Phinney and adjourned until later his cross-examination of Mr. Baird. Mayor Phinney lead the Board through land uses in the Town by references to the Generalized Future Land Use Map part of the MPS. He spoke of the development of the Town's MPS and LUB. He told how the Town handles development proposals in general and this one in particular.

According to Mayor Phinney, the proposed development approved by Council in its decision to rezone, met the intent of the MPS and the action of his Council in so rezoning ought to be supported by the decision of the Board. He felt Council, in making its decision in this rezoning, had before it for consideration all relevant portions of the MPS.

Wayne Gibbons, Director of Planning and Development Officer for the Town was the next witness for the Town. He was accepted by all parties actively before the Board as an expert planner qualified to give opinion evidence as it concerned matters of planning in the Town and the Board, on perusal of his curriculum vitae (Exhibit L-23), accepted him as such. Mr. Gibbons has 9 years planning experience in Kentville preceded by

9 years planning experience in Dartmouth.

Mr. Gibbons believes that proposed development envisaged in the rezoning approved by council in this case is a good proposal, important for the proper development of Kentville and meets the intent of the MPS.

Councillor Marian Ross is a member of Council for 4.5 years and is also a member of Council's Planning Advisory Committee (PAC). She says she listened carefully to all representations of the concerned citizens, of the planning staff of the Town, and of the other councillors who participated in the debate on the motion to rezone. Councillor Ross said she was familiar with the MPS and the other planning regulations of the Town.

From this information, she was able to formulate the opinion that the proposed development was in the best interests of Kentville and complied with the intent of the MPS and thus she voted for the approval of the rezoning which passed by a vote of 6-1.

Gerald Murphy, an assessor with the "Provincial Department of Assessment" introduced a Notice of Appeal in an assessment matter.

Maurice E. Lloyd, a thoroughly experienced planner, presented the Board his qualifications on a curriculum vitae, and with the consent of all parties active before the Board, he was qualified as an expert in urban planning capable of giving opinion evidence in matters of planning as they affect the Town.

About one year ago, Mr. Lloyd was approached by the Applicant "to do the planning and preliminary engineering for the 200 acres of land in the subdivision."

In the course of that retainer, Mr. Lloyd interviewed Mr. Gibbons and also made a study of the Town's MPS, its LUB and its subdivision By-law.

After these preliminary investigations, Mr. Lloyd came up with a proposal which, with some subsequent modifications, became the proposal accepted by Council in its decision to rezone.

Mr. Lloyd holds the opinion that the present proposal is both a suitable economic development of his client's land and meets the intent of the MPS. He holds the opinion that the proposal when developed will not produce any traffic problems such as contemplated by the Appellants. He is of the opinion that the proposed development's apparent present violation of the street widths required under the subdivision By-law need not be dealt with at present but only when application for subdivision is made.

Mr. Lloyd felt the effect of the proposed development on surrounding residential uses would be buffered by the topography and distances involved and the relative location of the mixtures of residential uses within the boundaries of the subject land.

Councillor Doreen Taylor, a member of the PAC, gave evidence stating why she voted for the rezoning.

Post-hearing memoranda were filed by the Town and also on behalf of the Appellants. The last of these was received May 4, 1987. At the hearing, the Board stipulated that it would withhold its decision until a transcript was available. Most of the transcript was delivered to the Board July 31, 1987. At the time of this writing (August 2, 1987) some of the transcript is not yet available. The Applicant before the Town did not submit a memorandum.

Schedule A to this decision contains some excerpts from the MPS and the LUB which the Board believes bear particularly on the issues in this appeal.

In the view of the Board, Mr. Lloyd and Mr. Gibbons are correct in their respective opinions when they say that the effects of the proposed development on the existing residential development along Park Street and within Glenwood Subdivision will be buffered by the design of the proposed development, the topography of the area in general, and the tree cover proposed.

The Board is not so satisfied with the effect of the extra vehicular traffic along Duncan Avenue (especially at its intersection with Park Street) but cannot say that that extra traffic in itself will clearly violate any provision of the MPS and thus the Board cannot say that the decision of Council was clearly contrary to the intent of the MPS with regard to the extra traffic. Although concerned with the possible intrusive effect of this extra traffic on the existing residential development in the Glenwood Subdivision, the Board cannot substitute its judgment on the potential traffic situation for the decision of Council.

The Board refers to Policy K-4A of the MPS [set out in part in Schedule A to this decision] which incorporates, inter alia, regulation 11(b)(ii) of the subdivision regulations into the MPS. Such incorporation destroys the use of Duncan Street extension as proposed as a proper width for a collector street for this large new development [see the definition of such a street in the By-law notation in Schedule A hereto]. Duncan Street extension has no practical chance of being widened short of rather expensive expropriations (which Council did not consider under Policy K-4B)) and had to be addressed by Council at the time of rezoning since it was set out in the proposal. Duncan Street extension (and that of its sister street extension of the arms of the slingshot) were the first street accesses the applicant proposed to open. The proposed northward extension of Auburn Avenue to Park Street for a great deal of its length suffers from the same lack of width for a collector street which, on the evidence before the Board, neither the developer nor the town have any present intention of spending to make it the required width. Mr. Lloyd would have us say that these matters can be put off to the time of some subdivision in future. The Board disagrees. The need is for the requisite street width for a collector road is both current and known. The proposal on its face demonstrates the present inability of the developer to meet the prescribed criteria for the collector road and there is no demonstration of the will of Council to provide the necessary land by the exercise of its expropriation and fiscal powers.

Thus the Board determines under s.63(3) of the Planning Act that the decision of Council made October 8, 1986 to rezone the subject lands does not reasonably carry out the intent of the MPS. Pursuant to s.63(5) of the same statute, the Board determines that it has no alternative but to allow the appeal. Therefore under s.63(4)(b) of the Planning Act the Board allows the appeal by reversing the decision of Council amending the LUB.

An Order will issue accordingly.

DATED at Halifax, Nova Scotia this 9th day of September, 1987.

RICHARD L. WBLDON
Member

SCHEDULE 'A'

EXCERPTS FROM MPS

POLICY K-4 IN ADDITION TO ALL OTHER CRITERIA FOR ZONING

AMENDMENTS AS SET OUT IN VARIOUS POLICIES OF THIS PLAN, COUNCIL SHALL ENSURE;

A: That the proposal is in conformance with the intents of this plan and with the requirements of all other town by-laws and regulations;

....

B: That the proposal is not premature or inappropriate by reason of:

(i) the financial capability of the Town to absorb any costs relating to the development;

EXCERPTS FROM SUBDIVISION REGULATIONS

11(b) The width of streets or roads shall not be less than as follows:

(i) arterials ....(65.62')

(ii) collectors ......(59.06')

(iii) local minor .....(50.03')

Bigney v. District of East Hants

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-2 TO C-3--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--MUNICIPAL BOARD ACT, S. 16(1)--PLANNING ACT, SS. 63(1),(2),(3),(4),(5),(7), 72--DISTRICT OF EAST HANTS: ELMSDALE/ENFIELD MPS, POLICIES P4-10, P9-1, P9-5

This is an appeal by E.W.B. from a decision of the Council of the Municipality of the District of East Hants refusing to rezone lands owned by the Appellant from General Residential (R-2) Zone to Commercial Local (C-3) Zone. The subject property is a 2700 sq. ft. corner lot on Highway No. 2 in Enfield with a large multiple unit building in the process of renovation. The Appellant proposed a 3-bedroom apartment, a bachelor apartment and approx. 500 sq. ft. of retail space. The Planning Advisory Committee and the planning staff recommended approval of the rezoning.

HELD: The appeal is allowed and Council instructed to rezone the subject lands as applied for.

The Board agrees with the recommendation of the Planner and the other evidence that the proposed rezoning falls within the intent of the MPS. Is the decision of Council also within the intent of the MPS? The Board concludes that the decision cannot reasonably be said to fall within the intent of the MPS since the Appellant has met all the requirements for the rezoning and the objections to the rezoning as expressed to Council do not warrant a refusal. The general thrust of the MPS is to ensure rational development and this proposal is to the benefit of the area. No planning evidence was adduced by the Municipality to show this proposal does not meet the intent of the MPS. Municipal Council is not bound to follow the advice of its planning advisors, but if it chooses not to do so, it must do so for reasons expressed in terms of the MPS.

NSMB-579-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, as amended;

-and-

IN THE MATTER OF: An Appeal by **ERNEST W. BIGNEY** from the decision of the Council of the Municipality of the District of East Hants made April 22, 1987, refusing to rezone Civic No. 205, Route 2, Enfield, from existing General Residential (R-2) Zone to a Commercial Local (C-3) Zone under Section 72 of the Planning Act.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: ROBERT CARRUTHERS, LL.B., on behalf of the Municipality of the District of East Hants,

ERNEST W. BIGNEY, on his own behalf.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, of the Municipal Board Act, the Vice-Chairman assigned Board Member Richard L. Weldon to hear this planning appeal at the Board's September 3rd, 1987, sittings at the Council Chambers of the Municipality of the District of East Hants, Milford, Nova Scotia. (The Municipality of the District of East Hants will be hereinafter referred to as the "Municipality".)

The Notice of Appeal was dated May 11, 1987, and filed with the Board on May 13, 1987, together with a written undertaking to pay the costs of advertising the Notice of Hearing. The Board assigned the Chairman to peruse this Notice of Appeal to determine whether or not the Notice of Appeal complied with the Planning Act, S.N.S. 1983, Chapter 9, and the Rules made thereunder as to the form and content of an appropriate Notice of Appeal. The Notice of Appeal cited as grounds for appeal:

> "1. That the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy.
>
> 2. That there appeared to be a discrepancy among Council Members as to the legality of the voting procedure. ...
>
> 3. That the decision was not consistent with the opinion and recommendations of the Planning Advisory Board.
>
> 4. That because of the decision I am suffering undue hardship. ...
>
> 5. that it is in the opinion of the Community that the zoning change and the completion of the renovation would be a welcome asset to the Community. ...
>
> 6. That the property had been previously used commercially. ..."

This is a taxpayer appeal made apparently without benefit of reference to solicitor. It appears from the record that the decision complained of was a refusal to rezone certain lands in Enfield from General Residential (R-2) Zone to Commercial Local (C-3) Zone, made by the Council of the Municipality of the District of East Hants on the 22nd day of April, 1987, to rezone Civic No. 205, Route 2, Enfield, from existing General Residential (R-2) Zone to a Commercial Local (C-3) Zone under Section 72 of the Planning Act or so it is stated in the commencement of the Notice of Appeal. It is apparent, however, that there is no agreement being appealed but a decision of refusal to rezone being appealed.

The Appeal seeks to have the Board reverse the decision of the Municipal Council of the Municipality of the District of East Hants (hereinafter referred to as the "Council") made April 22, 1987, refusing to amend the Municipality's Land-Use By-law by rezoning Civic No. 205, Route 2, Enfield from existing General Residential (R-2) Zone to Commercial Local (C-3) Zone.

The Appeal came on for hearing at 12:30 p.m. on September 3, 1987, at the Council Chambers of the Municipality at Milford, Nova Scotia, pursuant to a Notice of Hearing dated the 6th day of August, 1987. The Board heard evidence until 4:00 p.m. on the same day and then took a view of the site on the way back to Halifax from the hearing.

Service of the Notice of Hearing and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board and to the satisfaction of the Municipality.

These are excerpts from the Planning Act (in force at the time the decision was made). Sections bearing on this appeal bear quoting here:

> "Section 63(1)
>
> The ... refusal by a council to amend or revise the land-use by-law may be appealed by ...

> (b) the applicant; ...
>
> (2) An appeal filed pursuant to subsection (1) shall be served on the Board within twenty-one days ... of the date of the decision of the council.
>
> (3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.
>
> (4) The Board may
>
> (a) confirm the decision of the Council; ...
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy. ...
>
> (7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present."

The Appellant in this case is the person who applied to have his land rezoned and thus he is an applicant within the meaning of the above Section and has a right to appeal assuming he has filed his Notice of Appeal with the Board in time. He has filed his Notice of Appeal with the Board in time in this case. The Board therefore assumed jurisdiction to hear this appeal.

The area sought to be rezoned is a 2700 square foot lot situate on Highway No. 2 in Enfield, at the corner of Locks Road and the No. 2 Highway. There is a large multiple unit building in the process of renovation on that lot covering most all of the lot except room for three parking spaces at the rear. The lot as it exists now shows a partly renovated building, store windows installed in the front, gravel in the back and "No Parking" signs on the side. The lot is a corner lot and fronts on the busy Number 2 Highway which was originally a main highway of the Province before the building of the Hundred Series highways and on the Locks Road which is essentially developed with residential zoning and a spattering of service industry. Locks Road butts in a dead-end at the length of about a "city block" and has eight several properties on it, some vacant land and the inhabitants of Locks Road own about twenty-four highway using motor vehicles.

Mr. Bigney testified himself and called Mr. Brad Hodgins, the Municipal Planner for the Municipality of the District of East Hants. Mr. Carruthers called Mr. Glover, the Clerk and Chief Administrative Officer of the Municipality.

Mrs. Florence Benere testified on her own behalf and on behalf of the signers of a petition protesting the development from the local area and particularly from Locks Road. Mr. Henry McKeen, Chairman of the Ratepayers Association of Enfield, spoke to the opposition of that group to this rezoning.

Mr. Carruthers and Mr. Bigney then made argument. The Board reserved its decision which it is now delivering.

Mr. Bigney pointed out that he had the recommendation of the Planner that the change was necessary for his purposes in renovating the building which would give two units plus a commercial unit. The main difference between what would be allowed to him within the R-3 zoning and commercial space and what would be allowed to him in the C-3 zone plus the constrictions of the building size itself, would be 150 square feet of extra commercial space (the Planner in his subsequent testimony noted that the C-3 zone allowed 1,000 sq. feet of commercial space while the R-3 zone on the same lot of land would allow 350 sq. feet of commercial space in the circumstances that existed). In any event, Mr. Bigney made a strong case that he had taken an old delapidated building that had been out of business for some 20 or 25 years, was bringing it up to standard, was renovating it and would make a net improvement in the community. He dealt with snow removal problems on Locks Road which is only 33 feet wide and which amounted in last year's bad winter of the snow being pushed up against his building and narrowing down Locks Road. He spoke to the width of the gravel boundary of Highway Number 2 in front of his building and noted there was space available for parking in front of his building. This space had been traditionally used for parking and he spoke to the three parking spaces provided at the rear of the subject land. He suggested that the renovations he did would not extend the building any further then it already existed and that he was improving a situation that was poor. He said that economics and the demand for his tenants necessitated the rezoning.

The Planner, Mr. Brad Hodgins, stated his qualifications having two degrees in planning and experience in planning matters in the Province of Nova Scotia since 1977 and having been in his present job since 1983. He showed how the application was handled by the municipality. When the application came in it went to Council with a recommendation that it go to the public hearing stage. Mr. Hodgins then made studies, he listened to the Council and the public representations made and the only concern that he heard expressed that dealt with planning matters was a matter of parking, the traffic on the intersection of Locks Road and No. 2 Highway. After investigation with the Department of Highways and his own investigations he concluded that these issues were not determinate on the rezoning issue. He then prepared a report for the Planning Advisory Committee of the Municipality and also for Council. Exhibit B-10 is the list of documents prepared by the Municipality for this appeal and these reports are therein contained. According to the Minutes of Tuesday, February 24, 1987, the Planning Advisory Committee (P.A.C.) dealt with the Bigney property as follows:

> "Rezoning of lands of Lee Carroll, Enfield as submitted by Ernest Bigney from R-2 to C-3.
>
> The Planner presented a report indicating the purpose of the rezoning is to operate a commercial local C-3 zone permitted use from 500 square feet of the main storey, to convert remaining portion of the main floor to a bachelor rental

unit and to maintain the existing apartment on the second floor. On motion of Council, the Clerk and Deputy Warden Matheson, it was passed to recommend to Council the rezoning for advertising".

February 24, 1987, this report went as follows:

> "It is an existing undersized lot with an existing building and meets the provisions for area and frontage allowances in the by-law. Only concern identified is the deficiency of parking, which can be achieved off site within 400 feet of the lot. Applicant is pursuing the parking matter. The Development Officer's comments are attached. There are no planning concerns identified at this time that would prevent a favourable staff recommendation. Recommend to proceed to advertise the public hearing".

This report was followed by the Development Officer's comments.

The following are the Development Officer's comments on the rezoning of lands of Lee Carroll, Enfield, as requested by the Planner on February 18, 1987:

> "The application is submitted by Ernest Bigney, Windsor Junction, N.S. to rezone the lands of Lee Carroll, Enfield, from General Residential Single and Two Family (R-2) Zone to Commercial Local (C-3) Zone to enable the renovations of an existing building - (1) top floor three bedroom apartment; (2) back portion of the main floor to a bachelor apartment; (3) to renovate the front portion of approximately 500 sq. feet to an unspecified retail office space.
>
> The land in question is located on the corner of Provincial Highway No. 2 and Lock's Road, Enfield, containing an area of approximately 2,722.5 sq. ft. shown on tax deed registered in the Registry of Deeds, Windsor, in book 411, page 595-596, July 28, 1980.
>
> C3 Zone requirements: serviced Part 16 (2)
>
> Where municipally approved central piped services (or just central sewer) are available:

min. lot area	7500 sq. ft.
min. lot frontage	75 sq. ft.(sic)
min. front yard	25 sq. ft.(sic)
min. rear yard	20 sq. ft.(sic)

min. side yard each side	8 sq. ft.(sic)
max. height of main building	35 sq. ft.(sic)

> Parking requirements: as provided in Section 21, Part 6.
>
> C3 Uses Permitted Part 16 (1)
>
> any use permitted in the (R1) or (R2) zone subject to satisfying the R1 and R2 requirements.
>
> - Neighbour convenience stores
> - Personal Service shops
> - Professional offices
>
> Dwelling units, no more than two units, to be part of the same building as the commercial use, but not located on the main or basement floor where any door or window of said units face the front lot line."

The Planner then dealt with the change in use in buildings on undersized lots:

> "Notwithstanding anything else in this By-law, the use of a building on a lot on the effective date of this By-law may be changed to another use permitted on the lot by this By-law where the lot width or area required on both is less than the requirements and provided that all other requirements in this By-law are satisfied."

The lot in question clearly fits within the undersized lot provisions.

In response to the concerns of parking on February 27, 1987, Planner Hodgins wrote the Regional Engineer for the Department of Transportation as follows:

> "I am writing to request comments from your Department concerning the attached proposed rezoning of a lot of land located in Enfield fronting upon Route No. 2 at the intersection of Locks Road.
>
> Convention, over the many years of evolution of this property, has led to people parking upon the margins of the Route No. 2 right-of-way in front of the building. I believe one car parks there all of the time. Vehicles 'stopping' on the road right-of-way is a common practice

> in the immediate area (BJ's Takeout).
>
> This office would like to determine 'whether your Department has any intentions of preventing the parking use at the front of said described building."

> He received a reply on March 10, 1987, as follows:
>
> "The Department, at this time, has no plans for restricting this parking use. However, in the future, if it is found that this parking use is restrictive or dangerous to the traffic flow it may be determined by our Traffic Department to restrict the parking in the area."

On May 22, 1987, Mr. Hodgins again wrote to Mr. Freeman:

> "This office is preparing additional information on the enclosed rezoning matter and the perceived issue of traffic safety at the intersection of Locks Road and Route Number 2, in Enfield, has been raised.
>
> I would very much appreciate any comments your Department can offer on the safety aspects of this intersection, in relation to the proposed "local commercial" (meaning, limited to a corner store or a barber shop or a lawyers office of no more than 500 sq. feet floor area) zone."

Mr. Freeman the Divisional Engineer replied on June 9, 1987:

> "I have looked at this site again and can see no safety problems at this intersection. There is a wide shoulder area on Trunk #2 in the vicinity which allows parking well off the travelled way. Also, cars parked here are not interfering with the sight distance for cars at the end of Locks Road travelling onto Trunk #2."

Mr. Hodgins made notes in his files of other telephone conversations on or about April 27, 1987. He reported that Mr. Bigney had put "No Parking" signs on the Locks Road side of his building and he had had a school bus driver interview which bears quotation as follows:

"There are 5 elementary children who walk to school generally. Makes 2 stops in morning at Post Office parking lot - 2 High School children get on the bus. Total of 7 school children from Locks Road area.

Asked, "is it dangerous due to traffic?

Reply, "there is no safety problem at Locks Road Intersection. The children who cross Route 2 are generally good about traffic, which is quite slow anyway."

On April 7, 1987, the Planning Advisory Committee met and made the following recommendations:

"b) Rezoning of the Lands of Ernest Bigney, Enfield, from (R2) General Residential, single and two family to (C3) Commercial Local zone, indicating the purpose of the rezoning is to operate a (C3) zone permitted use from 500 sq. ft. of the main storey, to convery remaining portion of main floor to a bachelor rental unit and to maintain the existing apartment on the second floor.

The Planner presented the rezoning report and introduced Mr. Bigney to the Committee.

On a motion of Councillors Anthony and White, it was passed, to recommend the rezoning to Council."

The staff report is included in the Exhibit D-10 dated April 7, 1987, and is quite detailed. The Board has particular reference to the recommendation that the rezoning be approved and it also notes the analysis which comes up to this recommendation and quotes it in full:

"Analysis

The Integrated Planning Strategy designates this property as future residential subdivision which has been applied to this property due to the existing residential land use. Policy P9-5 enables rezonings to take place in this designation for commercial land uses. Policies P4-10 and P9-1 outline the criteria to be considered in evaluating this rezoning.

One of the five criteria of P4-10 raises the matter of adequate and buffered parking provision on the lot. The lot pre-existed zoning and it is undersized. Lot area and frontage allowances and waivres apply, but the on-site parking requirement should be satisfied. Two spaces are now accomodated on the lot which meet the requirements of the two dwelling units. The "less than 500 square feet" commercial space, is to be arrived at after square footage deductions are made for non-business spaces such as storage and utility areas. The public parking requirement for the commercial use will, therefore, be less than 2 spaces, but more than one space.

The plot plan shows three parking spaces at one side of the building. One of the spaces could partially meet the commercial public parking need.

The remaining commercial parking requirement will be an undetermined fraction of a parking space. If this were an application for a proposed building for the intended uses as stated, on-site parking would ideally consist of; 2 spaces for the dwelling units, 1 for the business proprietor or employee, and 2 public spaces for the commercial use, for a total of 5 spaces. The Land Use By-law requires between 3 and 4 on-site spaces. However, the pre-established parking situation has been parking on the Highway right-of-way for up to 3 vehicles. The Dept. of Transportation does not intend to restrict the use. However, the parking will be prevented if it interfers with Route 2 traffic.

Off-site parking seems to be the rule in this immediate vicinity, not only for the applicant property, but to a much greater extent by BJ's Take Out using the Highway Right-of-way and BJ's Work Out, using (without authorization) the abutting Post Office parking lot.

The planning opinion is that the applicant's deficiency of a fraction of a public parking space for the re-establishment of a commercial use on this undersized lot, is not sufficient to warrant a negative recommendation. It is acknowledged that a parking problem in the area exists as precipatated by another business property, all of which does not impact upon this application."

On April 10, 1987, Mr. Hodgins wrote this to

Mr. Bigney:

> "I have considered the matter of relaxing the buffering requirement of 6 feet between your property line and the on-site parking area. After staff consultation on the matter, it is determined that the buffer cannot be waived or altered, because the Land Use By-law clearly does not enable this flexibility.
>
> The other matter you raised concerning 'no parking' signage posted on your building, is a good idea and certainly worth pursuing to prevent unsafe parking along Locks Road."

The Planning Staff's report to Council dated April 22, 1987, seemed to follow the Staff's report to the Planning Advisory Committee and at least had the same analysis and conclusion. From the Minutes of Council of April 22, 1987, it appears that this matter was dealt with at some considerable length and the Board commends anybody interested to read the text which in most objections dealt basically with traffic and parking. The conclusion goes as follows:

> "After further discussion, the question on the motion to approve the rezoning application was called and defeated by a majority vote of Five (5) in favour and Six (6) against the motion.
>
> The Clerk advised that a motion to approve or deny (emphasis by the Board) a rezoning application required a majority vote of the Whole Council, which meant Seven (7) votes in support or opposition to a rezoning application. He suggested that the Warden should cast a vote to either give a Seven (7) vote majority or to tie the vote, in either event the motion would be lost.
>
> The Warden voted against the motion and the motion was defeated."

The Board has listened carefully rear and re-read the information contained in the Municipality's booklet and also the Exhibits presented by Mrs. Benere and noted the objections made therein by and on behalf of the inhabitants of Locks Road and by and on behalf of the Ratepayers Association. It has taken a careful view of the site and the Locks Road and it tends to agree with the recommendation of the Planner that so far as traffic and parking problems are concerned, from a safety point of view, this proposed development will not create any change of a substantial nature which would rationally give rise to the expressed concerns of the people making the presentations both to Council and to the Board. The Board therefore discounts the safety concerns as being real. It must now look to see if there are precise on-site parking requirements that have obviously not been met by a fraction of a parking lot and whether that particular deficiency is sufficient to create a violation of the intent of the MPS. Policy P4-10-C of the Municipal Planning Strategy (MPS) deals with parking and says merely as follows:

> "c) The parking areas are adequate and buffered; ...
>
> e) The use is contained within the building and the location of the use does not cause an imposition on an existing street that is used primarily for residential use."

The Board then looks to the Land-Use By-law to see if it can find a definition of required parking and notes at page 84 of that document number 16(6):

> "SPECIAL REQUIREMENT: PARKING
>
> In a Commercial Local (C3) Zone, off-street parking must be provided using the rear or side yards

of the lot and said parking area must be separated from the street and abutting use by a six foot (6) landscaped buffer strip."

Part (6) Paragraph 5 of the Land-Use By-law reads as follows:

"Existing Undersized Lots

Notwithstanding anything else in this By-law, a vacant lot held by separate deed from adjoining parcels on the effective date of this By-law, having less than the minimum width or area required by this By-law, may be used for a purpose permitted in the zone in which the lot is located and a building may be erected on a lot provided that all other applicable provisions in this By-law are satisfied and also provided that the necessary permits are secured for any private sewage disposal or water systems where no Municipally approved central services are available.

6. Existing Buildings

Where a building has been erected on or before the effective date of this By-law on a lot having less than the minimum frontage or area, or having less than the minimum setback or side yard or rear yard required by this By-law the building may be enlarged, reconstructed, repaired or renovated provided that:

a) The enlargement, reconstruction, repair or renovation does not further reduce the front yard or side yard or rear yard that does not conform to this By-law; and

b) All other applicable provisions of this By-law are satisfied.

21. Parking Requirements

For every building or structure to be erected or enlarged, off street parking located within the same zone as the use and having unobstructed access to a road or street shall be provided and maintained in conformity with the following schedule:

Type of Building	Parking Required
A) Residential	

i)	A dwelling containing not more than four (4) dwelling units.	One (1) parking space for each dwelling unit or rental room.
ii)	All other dwellings.	One and one-half (1.5) spaces for each dwelling unit or rental room.
C)	Commercial	
....		
iii)	Retail Stores and Offices.	One(1) parking space for each two hundred (200) sq. feet of public access floor area.
v)	All other commercial uses excepting automobile service stations or public garages.	One (1) parking space for each two hundred and fifty (250) square feet of public access floor area."

The parking appears to be needed within the same zone. In this particular case, as near as the Board can understand, the same zone will be the C-3 Zone of the one lot and the question then arises whether it need be that a fractional lot should be required on site. It appears that parking is available in the front of the building on the road side and has been traditionally there available. There is no apparent intention to rezone the street and the Board rather hesitatingly tends to follow the recommendation that the intent of the By-law is to see that there is appropriate parking in the general area which would include at least the fraction of one extra space towards the front of the building.

As a matter of fact, there appears to be parking within 400 feet which is an area mentioned in evidence but it does not show on any of the by-laws cited by the Board. The Board may have overlooked a part of the By-law although it could not find it. In any event, the Board says that the actual de facto parking cannot be seen to be a problem which would take this particular application out of the intent of the MPS.

The Board, therefore wholly agrees with the recommendation of the Planner and the evidence given at the hearing that the proposal and the rezoning falls within the intent of the MPS. The Board then raised the question was the decision of Council also within the intent of the MPS in which case the Board would have no jurisdiction to alter it under the sections of the Planning Act stated above. After reviewing all the evidence given and all the reports made and perusing the relevant law, the Board forms the conclusion that the decision of Council cannot reasonably be said to fall within the intent of the MPS since the applicant has met all the requirements for the rezoning and that the objections to the rezoning as expressed to Council do not warrant a refusal. The general thrust of the MPS is to ensure rational development of the area and this reconstruction or redevelopment is to the benefit of the area and is no real detriment. That being the case, the decision of Council negating this development cannot fall within the intent of the MPS and in fact no planning evidence was adduced by the Municipality to follow to show that this proposal does not meet the intent of the MPS.

As stated before in the decisions of other Board cases; the Municipality is not bound to follow the advice of its Planning Advisors but if it chooses not to do so it must do so for reasons that can be expressed and stated in terms of the MPS. Therefore, the Board determines under Section 63(3) of the Planning Act that the decision of Council made on April 22, 1987, refusing to rezone the subject lands does not reasonably carry out the intent of the MPS. Pursuant to Section 63(5) of the same statute, the Board determines that it has no alternative but to allow the appeal. Therefore under Section 63(4)(c) the Board will allow the appeal by instructing the Council to amend the By-law in a manner prescribed by the Board, namely, to grant the application to rezone as applied for by the Appellant.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 23rd day of September, A.D., 1987.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL
BOARD.

Coombes and Davis v. District of West Hants

PLANNING--SUBDIVISION--REFUSAL OF DEVELOPMENT OFFICER TO APPROVE PLAN OF SUBDIVISION--WHETHER COMPLIES WITH SUBDIVISION REGULATIONS--REFUSAL OF DEPARTMENT OF TRANSPORTATION TO APPROVE PLAN--MUNICIPAL BOARD ACT, S. 27 --PLANNING ACT, SS. 99, 103--PUBLIC HIGHWAYS ACT, S. 10(1)--TOWN OF WINDSOR M.P.S., POLICIES D.3.9.1, D.3.9.2, SECTION G.O., POLICY G.14

This is an appeal by D.C. and G.D. from a decision of a development officer refusing to approve a plan of subdivision for a 7.04 acre parcel of land located in the Municipality of the District of West Hants adjacent to the Town of Windsor. Upon the request of the Town, the Board ruled that the Town was a party and entitled to participate fully in the hearing on the basis that it "may be affected" by the decision pursuant to s.27(1)(c) of the Municipal Board Act. The District of West Hants has subdivision regulations. The development officer refused tentative approval because the Department of Transportation refused to give its approval, and the Department refused its approval primarily because the Town of Windsor would not approve the use of one of its streets as access to the proposed subdivision.

HELD: The Board confirms the decision of the development officer and dismisses the appeal.

The Board is governed in this appeal by s.103 of the Planning Act, which requires the Board to determine whether the proposed plan of subdivision complies with the subdivision regulations and to only allow the appeal where the plan is in accordance with the regulations. The subdivision regulations require the development officer to request comments and recommendations from, among others, the Department of Transportation. Those comments and recommendations are not to result in a refusal "unless the plan is clearly contrary to a law or regulation of the Province of Nova Scotia, the regional plan or to a by-law of the Municipality." Section 99 of the Planning Act requires that no plan of subdivision in a rural municipality shall be approved until the Department of Transportation has approved certain matters in connection with streets and roads. Since the approval of the Department pursuant to s.99 was refused, the plan was "clearly contrary to a law . . . of the Province of Nova Scotia" and so not in accordance with the municipal subdivision regulations. The development officer had no ability to give tentative approval. The basis on which the Department of Transportation decides to approve or to refuse approval for a tentative plan of subdivision is beyond the jurisdiction of this Board to consider.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983 Chapter 9;

- and -

IN THE MATTER OF: An appeal by David Coombes and George Davis from a decision of the Development Officer of the Municipality of the District of West Hants made May 23, 1986, refusing approval of a plan of subdivision for lands within the Municipality adjacent to the boundary with the Town of Windsor near Brightman Avenue.

BEFORE: ELIZABETH SALTON, Member

COUNSEL: PETER McINROY, LL.B., for the Appellants;

HAROLD G.S. ADAMS, LL.B., for the Municipality

BARRY J. ALEXANDER, LL.B., for the Town.

DECISION

The Board held a hearing in the Council Chambers of the Town of Windsor on November 3 and 4, 1986, on an appeal by David Coombes and George Davis from a decision of Robert Harvey, Development Officer of the Municipality of the District of West Hants (the Municipality) made May 23, 1986 which refused approval of a plan of subdivision for lands of the Appellants located in the Municipality adjacent to the southern boundary of the Town of Windsor (the Town) near Brightman Avenue.

The Notice of Appeal, dated June 6, 1986 was signed by Valerie L. Paul Romkey, "Solicitor for the Appellants for the purposes of filing the appeal". The Notice of Appeal (Exhibit C-1) was dated June 6, 1986 and received by the Board on the same day. It was accompanied by a written undertaking to pay the costs of advertising the Notice of Hearing. A covering letter from Ms. Romkey indicated that the decision of the Development Officer was received in the office of Adams & Company on May 23, 1986. On July 2, 1986 the Board received notice of a change of solicitor from Ms. Romkey indicating that Mr. McInroy would be representing the Appellants.

This appeal is made pursuant to Section 103 of the Planning Act. At the time of the hearing of the Appeal Section 103 stated:

> (1) Where a development officer refuses to approve a plan of subdivision, the applicant therefor may appeal the decision to the Board.
>
> (2) An appeal pursuant to subsection (1) shall be taken within fifteen days after the written decision of the development officer is served on the applicant.
>
> (3) In considering an appeal pursuant to the Section, the Board shall determine whether the proposed plan of subdivision complies with the subdivision regulations or subdivision by-law, as the case may be.
>
> (4) The Board shall
>
> (a) confirm the decision of the development officer; or
>
> (b) allow the appeal by directing the development officer to approve the plan of subdivision.
>
> (5) Where and only where the plan of subdivision is in accordance with the subdivision regulations or the subdivision by-law, whichever is applicable, the Board shall allow the appeal."

The grounds for the appeal cited in the Notice of Appeal are the following:

(1) That the Development Officer erred in refusing to grant

approval of the subdivision. The Development Officer's decision was based upon the refusal by the Department of Transportation to approve the plan of subdivision and since this decision was in error, the Development Officer's decision was in error as aforesaid. The Appellants state that the Department of Transportation's decision is a condition precedent and part of the Development Officer's decision. The Planning Act required the approval of the Minister of Transportation or an Official in his Department nominated by him for the purpose of the plan of subdivision and this was refused. The Appellants state that the Department of Transportation's refusal to approve the subdivision was made:

(a) without jurisdiction; or,

(b) in bad faith; or,

(c) without a proper determination as to whether or not the Town of Windsor had a right to refuse access to the Appellants' subdivision.

(2) The Appellants state that the only reason for the Department of Transportation's refusal is because the Town refused access to the subdivision. The Appellants state that this should not have been a determination leading up to the refusal of the Department of Transportation's permission. This is not an element to be considered in the Department of Transportation's approval because it is beyond the Department of Transportation's jurisdiction.

(3) The Appellants state that the proposed subdivision meets the requirements of the Subdivision Regulations and By-law and therefore should be approved.

(4) The political decision of a Town Council as to whether or not access should be granted is not a proper consideration for the Department of Transportation, that is to say, this decision is beyond their jurisdiction. The Appellants state that the Department of Transportation should have granted their approval and left the matter of access as being a matter between the Town of Windsor and the Appellants herein."

Accompanying the Notice of Appeal was a copy of a letter from the Development Officer to the Appellants conveying his refusal decision (Schedule "B" to the Notice) and a copy of a letter from a Department of Transportation Division Engineer to the Development Officer (Schedule "C" to the Notice). These letters state:

"May 23, 1986

Mr. George M. Davis &
Mr. David Coombes
P.O. Box 368
Windsor, Nova Scotia
B0N 2T0

Dear Sirs:

Re: Your Proposed Oakmount Subdivision at the end of Brightman Ave. in the Municipality of West Hants

This is to inform you that I cannot give tentative approval to your subdivision as the Department of Transportation will not approve this subdivision until the Town of Windsor approves this street as an access road.

Department of Transportation approval is required under Section 99 of the Planning Act. Under Section 103 of the Planning Act you have the right to appeal within fifteen days by decision to the Nova Scotia Municipal Board.

I am enclosing a copy of the letter from the Department of Transportation refusing approval, for your information.

Yours truly,

Robert Harvey
Development Officer"

"Windsor, N.S.

Mr. Robert Harvey
Development Officer,
Municipality of West Hants,
P.O. Box 344,
Windsor, N.S.
B0N 2T0

Re-Oakmount Subdivision, Windsor

Dear Mr. Harvey:

This is further to my letter of April 1, 1986 concerning the above noted subdivision as shown on drawing #86509-1 dated March 1986 and drawing #86509-2 revised April 9, 1986 prepared by M.G. Williams, P.Eng.

The right-of-way is now of sufficient width to accommodate the grades as shown on the above noted revised plan. However the drainage pattern and the opposition from the Town of Windsor must still be resolved.

The position of this Department is that we cannot approve this subdivision until the town approves their street as an access.

Yours truly,

R.I. Colburne
Division Engineer"

The Board satisfied itself that all preliminary matters had been properly carried out and completed and with the agreement of the parties took jurisdiction to hear the appeal on its merits.

Counsel for the Town requested the status of a party in the hearing of the appeal, a position he had conveyed to the Board in a letter received October 29, 1986 which states in part:

> "Please be advised that I act as Solicitor for the Town of Windsor with regard to the above-noted matter and the Town of Windsor intends to appear at the hearing scheduled for November 3rd and 4th, 1986 in Windsor and to oppose the appeal. I will be representing the Town in this regard and we will be calling a number of witnesses. I will be appearing pursuant to the provisions of the Municipal Board Act s.27. I have notified Mr. McInroy who is representing the appellant and he will not be making any objection in this regard."

Section 27 of the Municipal Board Act, S.N.S., 1981 Chapter 9, states;

> "27(1) Parties to any application, appeal or other matter or proceeding before the Board include
>
> (a) the applicant or appellant;
>
> (b) the person responsible for a decision or act that is appealed;
>
> (c) any municipality and any board,commission, committee or agency thereof that may be affected;
>
> (d) the Minister.
>
> (2) Parties shall be notified of the commencement of proceedings and of any hearing, and may appear and participate in the hearing.
>
> (3) Any person may appear and give evidence on any matter before the Board, but may not participate in the hearing except as permitted by the Board.
>
> (4) The Board shall permit any person who demonstrates to the Board that he has a real and substantial interest in the subject matter of the proceeding to participate in the hearing."

Counsel for the Municipality took no position on the Town's participation in the hearing. Counsel for the Appellants took the position that the Town was neither the Appellant nor the Respondent and should therefore be limited to making a presentation only as allowed by Section 27(3) of the Municipal Board Act. Counsel for the Town stated that the Town qualified as a party as provided for in Section 27(1)(c) of the Act since it was a "Municipality ..... that may be affected". The Board agreed and ruled that the Town was a party pursuant to Section

27(1)(c) of the Act and thus was entitled to participate fully in the hearing.

Counsel for the Appellants called 10 witnesses, Counsel for the Town called 3, and one person gave evidence on his own behalf. Counsel for the Municipality did not call evidence but did participate in cross-examination.

David Coombes, a resident of Falmouth and co-owner of the subject lands, gave evidence on the proposed development to be called Oakmount Subdivision which had been refused tentative approval by the Development Officer of the Municipality. The developers had intended to subdivide their 7.04 acre parcel into 16 residential lots ranging in size from 8400 square feet to 26,400 square feet, as shown on a tentative plan dated "March 1986" drawn by M.G. Williams, Registered Professional Engineer, and filed as Exhibit C-8. An additional undersized lot was intended to be added to an existing residential property in order to accommodate an existing encroachment. Access to the parcel was to be gained by constructing an extension of Brightman Avenue, a dead-end local street running southwest off Campbell Drive to approximately the Town-Municipality boundary. The subdivision was intended to be fully serviced with sewer and water from existing sewer and water mains owned by the Municipality which cross the north-end of the subject property.

Mr. Coombes said that he and Mr. Davis had applied to the Municipality in April 1986 for approval of their proposed subdivision and had received two letters from the Development

Officer one of which was a copy of a letter from the Department of Transportation Division Engineer to the Development Officer. Both letters were filed as Exhibit C-4. The letter from R.I. Colburne, Division Engineer, to Robert Harvey, Development Officer, dated April 1, 1986 states in part:

> " I have reviewed these plans and have the following comments:
>
> 1. The contour information indicates that on the upper side through the cut section, the back slope cannot be accommodated with the right-of-way provided.
>
> 2. The Town of Windsor is strongly opposed to this development and is unlikely to consent to the proposed drainage pattern. Furthermore, Town officials have indicated they may deny access from this development, into the town through Brightman Avenue. I am therefore referring this matter to senior officials of our Department for comment on what implications this may have, if any, with regard to our approval of the proposed subdivision."

The letter from Robert Harvey to Messrs. Coombes and Davis, dated April 4, 1986, states:

> " Enclosed is a copy of a letter I received from the Department of Transportation regarding your proposed Oakmount Subdivision. Until these two items are settled I cannot grant tentative approval to this plan.
>
> If you have any questions regarding this, please contact R.I. Colbourne at 798-2369."

Mr. Coombes said that Mr. Williams had assured him that perceived drainage problems referred to in Mr. Colburne's May 20 letter to Mr. Harvey could be solved, but Mr. Coombes and his partner decided to appeal the subdivision plan refusal because the Town's opposition to the proposed development still appeared to stand in the way of its approval. Mr. Coombes considered residential development to be the most appropriate use of the subject property which was zoned R-1, Single Family Residential.

In cross-examination Mr. Coombes agreed that he had known that the Town was opposed to the development of the subject property before he and Mr. Davis had purchased it on December 27, 1985. A letter dated December 5, 1985 to Mr. Coombes from Mr. Armstrong the Town Administrator (Exhibit C-6) states:

> " In September of this year you wrote about a proposed development of a parcel of land in the Municipality adjacent to the Town boundary. The Town street, Brightman Avenue, ends at your property line and the Municipal boundary. You asked if you could use the Town street for access to your proposed subdivision.
>
> This matter was referred to the Planning Advisory Committee and at its November meeting that Committee recommended to Council that Council not give approval to your request. This recommendation was accepted by Council at its regular meeting on November 26th.
>
> I would like to outline for you the reasons for this refusal.
>
> In making decisions of this kind Council must be guided by the policies laid down in the Windsor Municipal Planning Strategy which was approved by Council on October 25th, 1983 and approved by the Minister of Municipal Affairs on January 18th, 1984.
>
> Brightman and Campbell Avenues are local streets as defined in the Planning Strategy which states as follows: "Local Streets are primarily for access to property. It should be Council's policy not to encourage local streets to be developed for excess lengths, thus building up traffic volume."
>
> As a matter of general policy the Town has to consider the total effect on the Town of access from the Municipality to our residential (local) streets and subdivisions. There is already a great deal of traffic coming to King Street from Highway #1, the Brooklyn Road, Three Miles Plains, Chester Road and College Road. To grant your application would increase traffic on Brightman and Campbell Avenues and thence on to King Street. Instead of being local residential streets, as they are intended to be, those avenues would soon become collector streets discharging further traffic into King Street.

> The extension which you propose might in future be used to discharge traffic not only from your proposed subdivision but from a much larger area beyond it as further subdivisions were developed adjacent to your subdivision in the Municipality. The end result would be that the Campbell Avenue area would cease to be a local residential area as it is designed to be. To grant your request would be contrary to the Windsor Municipal Planning Strategy."

Mr. Coombes said that he did not consider that there were alternative access routes for Oakmount Subdivision other than by an extension of Brightman Avenue. He did not believe that the possibility of access to the subject property by a link to the Dill Road in the Municipality some distance to the southwest was viable at this time.

Robert Harvey, Development Officer for the Municipality since 1972 said that the proposed Oakmount Subdivision was satisfactory in respect to lot sizes and sewer and water services, and in fact in every respect except that it lacked the approval of the Department of Transportation. He stated that he had not encountered a situation similar to this before and could find no other development officers who had either.

Mr. Harvey stated that he had followed the requirements of Section 4 of the Municipality's Subdivision Regulations (Exhibit C-9) which states:

> "(1) When the Development Officer or the Clerk, as the case may be, is satisfied that a tentative plan contains the information required by Section 3 he shall forward a copy of the plan to the following for their comments and recommendations:
>
> (a) the Regional Director, Department of Highways
>
> (b) Board of Health

> (c) Department of the Environment
>
> (d) Municipal Engineer
>
> (2) No approval of a tentative or final plan of Subdivision may be refused or withheld as a result of comments or recommendations made under subsection (1) unless the plan is clearly contrary to a law or regulation of the Province of Nova Scotia, the regional plan, or to a by-law of the Municipality."

He believed that the reason for the Department of Transportation refusal to approve the tentative plan for Oakmount Subdivision must have been because it was contrary to the Public Highways Act. He assumed that the Department would have considered their Act "before they turned it down".

In cross-examination, Mr. Harvey agreed that he had refused approval for the tentative subdivision plan of the subject property because of the refusal by the Department of Transportation to approve the proposed public road as required by Section 99 of the Planning Act. Although he had considered Section 4(2) of the Municipality's subdivision regulations, he agreed that when the two conflict the Planning Act took precedence over the subdivision regulations which apply only to the Municipality.

To the best of his knowledge, Mr. Harvey believed that three residential lots fronting on a paved extension of Brightman Avenue which lies mainly in the municipality and is wholly owned by Messrs. Coombes and Davis, were never given subdivision approval by the municipality. Lands of Wendall and Jeannine Miller are located entirely within the Town to the east of Brightman Avenue. Only the southwest corner of their lot is in contact with Brightman Avenue, with the 105.40 foot frontage of the lot on the Brightman Avenue extension owned by the developers of Oakmount Subdivision. The lot immediately adjacent to the southeast of the Miller lot lies partially in the Town and partially in the Municipality. It is owned by Cheryl Pemberton. Exhibit C-8 indicates that the inter-municipal boundary diagonally bisects the house located on the lot. The 90 foot frontage of the Pemberton lot is also on the Brightman Avenue extension owned by the developers of Oakmount Subdivision. On the opposite side of the Brightman Street extension are the lands of Francis and Margaret MacPherson consisting of two lots - Lot 6 and Lot 6A. Mr. Harvey agreed that he had approved Lot 6A, which lies to the south of Lot 6 and is wholly within the Municipality, as an addition to Lot 6. Lot 6 has 151.61 feet of frontage on the Brightman Avenue extension and a very small triangular portion of Lot 6 appears to be on the Town side of the boundary, protruding into the right of way of Brightman Avenue. Mr. Harvey believed that the MacPherson, Miller and Pemberton lots may have been approved by the Town.

Mr. Harvey acknowledged that lots whose boundaries cross municipal boundaries need joint approval from both units. He said that he had not noticed that Lot 1 of the proposed Oakmount Subdivision lies partly in the Town and so had not forwarded copies of the plans submitted to him to the Town for approval.

Gary Cochrane, Warden of the Municipality, said that he believed he expressed the feelings of his Council when he said that he supported and understood the decision of the Development Officer although he believed that the proposed Oakmount Subdivision would have served people well and could have been serviced by the Municipality. Warden Cochrane said that he was aware of other similar potential development problems and hoped that agreement would be reached so that developments could be approved adjacent to the Town boundary. Warden Cochrane had walked the subject property and believed that there was no other feasible access to it other than Brightman Avenue because of the steepness of the grades in the area.

In cross-examination the Warden explained that both the Town and the Municipality have planning departments but there is a joint Planning Advisory Committee. After approval of the Oakmount Subdivision plan was refused, an ad hoc joint boundary committee of six was formed to examine the problem of access in this area and other border areas where development could occur. Warden Cochrane who was an ex-officio member of the committee, reported that no agreement could be reached on alternative access for Oakmount Subdivision other than via Brightman Avenue. Compensation requested by the Town for upkeep and improvements which would be needed for that street was not acceptable to the municipality. Similarly the Town's request for sharing in the cost of a study to be done by engineering consultants on the implications for the Town of the development of the subject lands was rejected by the Municipality.

Roland Lucy, President of the Windsor and District Board of Trade, said that the executive of the Board was supportive of new residential development and therefore supportive of the proposed Oakmount Subdivision. The Board's executive had understood that a joint boundary committee had been struck to address the obstacles involved and had written the town council expressing the hope that the impasse between Town and Municipality could be resolved.

Bruce Lake, a Nova Scotia Land Surveyor, confirmed that his firm had been retained to draw up the external boundary plans of the subject lands for the owners of the proposed Oakmount Subdivision. He confirmed that a plan (Exhibit C-12) showing "Lands conveyed to David Coombes and George M. Davis, Curry's Corner, Hants County", dated February 15, 1986 and signed by Curtis C. Kimball, a partner of Mr. Lake's in the firm of Redden and Lyon Surveys Limited appeared to be the basis for the engineering drawings of the proposed subdivision, Exhibit C-8. To determine the location of the Town boundary, a number of previous surveys in the area were compared with the legal description of the Town boundary. After this comparison, one of the previous surveys was considered satisfactory. Mr. Lake recalled a 15-20 foot discrepancy in the location of the Town boundary in one of the plans which was examined. Exhibit C-12 gives no indication of the location of paving on Brightman Avenue or its extension.

Malcolm Williams, a professional engineer responsible for the proposed Oakmount Subdivision, outlined the considerations involved in the process. Mr. Williams has 30 years' experience in the municipal engineering field. It was his opinion that the Oakmount Subdivision which proposed to use existing services was the most economical subdivision which could be constructed.

Mr. Williams verified that the survey plan described by Mr. Lake (Exhibit C-12) was the basis for Exhibit C-8. Under his supervision the services were checked and mapped, contours were applied from an aerial survey and lot lines, road layout and service extensions were mapped. Mr. Williams believed that the amount of storm run-off from the proposed subdivision would be minimal but he acknowledged that the Brightmen Avenue ditches were very shallow. He believed that the existing ditches if improved could handle the additional storm drainage, however it would also be possible to divert the storm run-off from the proposed subdivision via an easement to the Domtar lands located on the eastern boundary of the subject property wholly within the Municipality.

In cross-examination, Mr. Williams acknowledged that he had not checked the capacity of the storm drainage collection point at the intersection of Brightman Avenue and Campbell Drive. He agreed that traffic on both streets would obviously increase as a result of the proposed development and that there was a sight distance problem at the intersection of King Street and Campbell Avenue.

Robert Loring, Director of Public Works for the Town for 14 years, gave evidence on traffic, road maintenance and drainage matters in the area of the subject property. Throughout the time that he has been Director, Mr. Loring stated that Brightman Avenue has been paved to its current extent and during that time it has never been re-surfaced but only patched as needed. He confirmed that the Town has snow-plowed, ditched and maintained the full extent of the street and that the Miller, Pemberton and MacPherson properties are connected to town services. He agreed that the intersection of Campbell Avenue and King Street was a dangerous intersection partly because of a hedge on private property at the corner which obscures sight distances. Mr. Loring also confirmed that there was an "unofficial" road connection between the southern end of Campbell Avenue and the southern end of Sunnyhill Drive which is the next street parallel and to the west of Campbell Avenue. This connecting road is maintained by the Town although it is not a scheduled road and lies partly in the municipality. It is used by garbage trucks and other service vehicles as well as area residents. There are currently 5 houses located on Brightman Avenue and 14 on Campbell Avenue.

In cross-examination, Mr. Loring said that he had assumed that Brightman Avenue and the Town boundary both ended at the Pemberton property and only discovered the confusion about the location of the end of the street 5 or 6 years before.

Robert Colburne has been a Divisional Engineer with the

Department of Transportation for 8 years. He was responsible for Hants County for 6 years until June 1986. Access point, grades, land served and drainage are all basic matters to be considered before the Department gives road approval. Mr. Colburne said that the proposed Oakmount Subdivision presented an unusual problem because the road requiring approval was an extension of a Town Street. In his consideration of the proposed road for Oakmount Subdivision, Mr. Colburne had discovered through Mr. Loring that the Town was opposed to both the resulting drainage and the layout. Mr. Colburne considered that workable revisions of the drainage were possible, however since he had never met opposition by an abutting municipal unit before, he consulted his Regional Manager, Robert Johnson. The response to Mr. Colburne was in the form of a copy of a memo from the Director of Maintenance to the Regional Manager, dated May 5, 1986 (Exhibit C-13) which states:

> " Please refer to your memo of April 22, 1986.
>
> According to the Provincial Subdivision Regulations, we can only approve a subdivision road which leads from a road owned and maintained by D.O.T. or a public road as defined in the Highway Act. Therefore, we cannot approve this subdivision until the Town approves their street as an access."

Mr. Colburne said that he believed that the Brightman Avenue extension had never been deeded to the Department or been maintained by the Department. The existing Brightman Avenue extension which lies in the Municipality, would interface with the proposed subdivision road described on Exhibit C-8 as Brightman Avenue extension.

According to Mr. Colburne, the Provincial Subdivision regulations contain a section which indicates that a private road has to connect to an existing public road as defined by the Highway Act. This is not specifically re-stated as a requirement for proposed public roads, "but obviously we have to consider the same requirements - we can't consider listing a road unless we can get to it." To service and maintain the Brightman Avenue extension proposed for Oakmount Subdivision, the Department would have to depend on Town streets for access. Senior staff in the Department decided that without the approval of the Town in this case of the use of its street as access to the cul-de-sac street proposed for Oakmount Subdivision, the Department could not approve the tentative plans for the subdivision.

On the subject of Section 99 of the Planning Act which requires Department of Transportation approval of subdivision plans in a rural municipality, Mr. Colburne stated that he had assumed that Section 99(1)(b) referred to connections between public roads and private roads. That Section states:

> "99(1) .... no plan of subdivision ..... shall be approved until the Minister of Transportation or an official in his department .... has approved
>
> ....
>
> (b) the right of way, alignment and gradients of all proposed streets and roads that are not to be owned and maintained by the Province."

He agreed that it could also be interpreted as referring to public streets and roads owned by a Town, although he said he had not had occasion to consider such an interpretation.

In cross-examination, Mr. Colburne agreed that he would have given his approval for Oakmount Subdivision if he had not received an objection from the Town. Although Provincial Subdivision Regulations do not apply to the Municipality, it is the policy of the Department of Transportation to apply the provincial subdivision regulations to all municipalities whether or not they have their own approved subdivision regulations.

Robert Johnson, Regional Manager for Halifax and Hants until May 1986 confirmed that he had forwarded Mr. Colburne's request for comments on the Town's refusal to approve access to Oakmount Subdivision to Mr. Jack Walsh, then Assistant Director of Maintenance. Mr. Johnson's accompanying memo to Mr. Walsh (Exhibit C-15) stated in part:

> " It is my opinion, that, irregardless of the official protest or objection from the Town of Windsor, that the Department cannot deny the subdivider the right to develop this road only on the merit of the objection from the Town."

Brian Malone, Director of Planning for the Windsor-West Hants Joint Planning Advisory Committee 9JPAC0 for the past 5 years, reviewed the policies of the Town's MPS relevant to access for Oakmount Subdivision and the boundary matters discussed by the Joint Boundary Committee.

Mr. Malone was of the opinion that the residential development of the subject property which was zoned residentially and had municipal services running through it was appropriate, but he had reservations about the timing of the development. Two years previously a survey of the residential capacity of the Town identified that there were few opportunities for infilling in currently developed areas and as a consequence the Town's MPS identifies four areas for future residential development, none of which are in the area of the subject property. Mr. Malone said that there was some potential for "intensification" of existing housing stock in the Town, i.e., conversions of large homes into apartments, but that current demand was principally for single family homes.

Mr. Malone acknowledged that there were some other Town streets which abut the boundary like Brightman Avenue. If the Town continues its policy of refusing approval for access to such streets for developments in the Municipality, Mr. Malone agreed that the result would be that certain sites in the Municipality at this time would be limited in their potential for additional development. Mr. Malone stated that there was no reference in the Town's MPS to a "buffering strategy" to inhibit development on the boundary. He agreed that a policy to resist development in areas bordering the Town could inhibit the maximum use of land and services but he said that the timeliness of development was a valid concern for the Town.

Mr. Malone demonstrated on a large scale topographical map of the southern part of the Town and adjacent areas in the Municipality (Exhibit C-16), the alternative access routes to the subject property which were investigated by the Joint Boundary Committee established by JPAC. In terms of planning and engineering considerations only, it was his opinion that Brightman

Avenue was the best access to the subject property.

Mr. Malone reviewed the policies in the Town's M.P.S. which deal with transportation. Streets in the town are categorized as regional roads, arterial roads, collector routes and local streets; streets and roads in the first three categories are specifically designated, all other streets are local streets.

Section G.O. of the MPS lists the following transportation issues facing the Town:

> (a) the increasing strain being placed on the town's transportation system due to rapid growth in outlining areas;
>
> (b) a road pattern made less efficient because of difficult grades and angles of street intersection;
>
> (c) roads within the old built-up areas of Windsor which have inadequate rights-of-way widths;
>
> (d) the increasing cost to residents of transportation due to the significant number of town residents who commute to work;
>
> (e) cost-sharing and jurisdictional differences which made a more "regional" approach to transportation planning difficult."

Policy G.14 concerns local streets:

> "Local streets are primarily for access to property. It shall be Council's policy not to encourage local streets to be developed to excess lengths, thus building up traffic volume."

Mr. Malone established that Brightman Avenue, Campbell Avenue and Sunnyhill Drive are all local streets. Mr. Malone believed that if the Dill Road, which lies to the south of the above streets, were extended northward to meet Sunnybrook Drive, the result would be that Sunnybrook Drive would have to be redesignated as a collector route, requiring an amendment to the Town's M.P.S.

In cross-examination Mr. Malone agreed that any development on the Town's borders could increase traffic in the Town, with or without links to Town roads. He agreed that Policy D.3.9.1 and D.3.9.2 amounted to a restriction on development in West Hants and stated that there had been some concerns expressed by the Department of Municipal Affairs about the legal validity of those policies which state:

> "D.3.9.1. There are two residential areas in Windsor which are located adjacent to the West Hants Municipal boundary and which in the future could be extended into that municipality. These two areas are Sunnyhill Drive - Campbell Avenue in the south and Underwood Drive to the east. Development in West Hants would be most easily accomplished by the extension of town streets and services. However, there are two important considerations for the town before permitting this to occur. First of all, the extension of town streets and services into West Hants in order to open up new land for development provides little benefit to Windsor in terms of increased assessment. In fact, it could result in less development occurring in town. Secondly, there is the question of road maintenance since in West Hants this is the responsibility of the Department of Transportation while in Windsor it is the Town's. Until such time as a more regional approach can be established, development in these areas of West Hants adjacent to Windsor will be discouraged."
>
> "D.3.9.2. It shall be the policy of Council not to permit the extension of town services in the Sunnyhill Drive-Campbell Avenue and Underwood Drive areas unless the concerns of Policy D.3.9.1 are resolved."

Mr. Malone summarized his concerns with the proposed development as centering on the suitability of the intersection of Campbell Avenue and King Street to bear additional traffic and a possible critical level of traffic affecting Brightman Avenue and Campbell Avenue resulting from the Oakmount Subdivision. He expressed no concern that the further proposed extension of Brightman Avenue would result in the excessive street length referred in Policy G.1.4.

Stanley Gardiner, a professional engineer with CBCL Limited specializing in traffic engineering, reviewed this report commissioned by the Town entitled "Brightman Avenue Extension Access Study (Exhibit C-20). The report outlines the specific tasks involved as follows:

> " - Evaluation of the traffic capacity of Brightman and Campbell Avenues.
>
> - Evaluation of the effect of additional traffic loading on the pavements on Brightman and Campbell Avenues.
>
> - Investigation of the problem of restricted sight distance at the Campbell Avenue/ King Street intersection.
>
> - Investigation of the capacity of the Brightman Avenue - Campbell Avenue storm sewer system.
>
> - Evaluation of the impacts of development of a larger site south of Campbell Avenue, noted as Area "A" on Figure 1."

The conclusions reached in the report are as follows:

> " - Campbell Avenue and Brightman Avenue have sufficient traffic capacity to accommodate the proposed Brightman Avenue Extension development.
>
> - The obstructions to the sight line at the Campbell Avenue/King Street intersection should be removed prior to development of the Brightman Avenue Extension (Estimated cost: $9,000, not including land acquisition).
>
> - The increase in traffic related to the proposed development will result in additional costs in pavement upgrading on Brightman and Campbell

Avenues. (Estimated cost: $22,000., not including inflation and interim patching).

- Storm water from the proposed development should be directed away from the existing ditches on Brightman Avenue. If not, the existing ditch system will require upgrading. (Estimated cost: $10,000.)

- The development of additional lands adjacent to Campbell Avenue and south of the Town of Windsor should not take place until a comprehensive development plan for the area is prepared and accepted."

In cross-examination, Mr. Gardiner agreed that the existing paving on Brightman Avenue and Campbell Avenue "has deteriorated" and that the obstructions at Campbell Avenue and King Street are a present danger. If the storm drainage from the subject property were diverted away from Brightman Avenue the only real additional cost to the Town would be $22,000.00. He agreed that the development of the proposed Oakmount Subdivision could result in a safer intersection at Campbell Avenue and King Street for the residents of Brightman Avenue and Campbell Avenue.

Mayor Earl Hood objected to the conversion of existing local residential streets such as Brightman Avenue and Campbell Avenue into collector streets which he felt would be the result of the development of the subject property and other undeveloped properties in that area. His preferred solution was a solution for the whole area in the vicinity of the subject property which he felt might necessitate a new street to access this area of the Municipality adjacent to the Town boundary. In his opinion the priority area for residential development in the Town was in the College Road area where the Nova Scotia Housing Commission owned property capable of being developed into 90 residential lots. Mayor Hood believed that approval of the proposed Oakmount Subdivision would have the effect of altering the Town's priorities for residential development which should be the prerogative of the Town rather than developers in the Municipality. Mayor Hood said that there had been no negotiations between the developer and the Town about the costs of improvements which Oakmount Subdivision might necessitate.

Walter Stephens, a 20-year veteran on Town Council and Chairman of the Town's Public Works Committee, objected to additional expense for Town taxpayers for the benefit of residents and developers in the Municipality. According to him, 40 cents of every tax dollar was spent by the Town on street maintenance. He estimated that upgrading which could be necessitated by Oakmount Subdivision could cost from $41,000.00 to $64,000.00.

Alvin Cochrane, who has lived at 141 Campbell Avenue for 23 years, submitted a petition (Exhibit C-22) signed by 17 persons which states in the heading that it is a petition against the extension of Brightman Avenue and Campbell Avenue. His personal concerns were with the effects of construction on these two streets and with storm drainage. As far as he is concerned, potential improvements to the safety of the Campbell Avenue and King Street intersection which might result from the development of the Oakmount Subdivision would be offset by the increase in traffic on Brightman Avenue and Campbell Avenue.

Following the hearing of this appeal briefs were submitted by Counsel for the Appellants, the Town and the Municipality, with rebuttal briefs submitted subsequently on behalf of the Appellants and the Town.

The relevant section of the Planning Act which governs the Board in this appeal was quoted at the beginning of the decision as follows:

> [103]"(3) In considering an appeal pursuant to this Section, the Board shall determine whether the proposed plan of subdivision complies with the subdivision regulations or subdivision by-law, as the case may be.
>
> (4) The Board shall
>
> (a) confirm the decision of the development officer; or
>
> (b) allow the appeal by directing the development officer to approve the plan of subdivision.
>
> (5) Where and only where the plan of subdivision is in accordance with the subdivision regulations or the subdivision by-law, whichever is applicable, the Board shall allow the appeal."

The evidence indicated that the Municipality has subdivision regulations which first came into effect on December 5, 1974, and have been amended since that time, the latest amendments being effective March 26, 1981. The Municipality's subdivision regulations require the Development Officer to request comments and recommendations from among others, the Department of Highways, now the Department of Transportation. Those comments and recommendation are not to result in a refusal by the Development Officer "unless the plan is clearly contrary to a law or regulation of the Province of Nova Scotia, the regional plan or to a by-law of the Municipality". (emphasis added).

The Development Officer refused to give tentative approval for Oakmount Subdivision because the Department of Transportation refused to give its approval. The Department's approval was withheld primarily because the Town would not approve the use of Brightman Avenue as access for the proposed subdivision. The Development Officer stated that the refusal by the Department of Transportation to approve the tentative plan of subdivision invoked Section 99 of the Planning Act which now states that no plan of subdivision in a rural municipality shall be approved until the Department of Transportation has approved

> "(a) all public streets and roads shown on the plan of subdivision, or part thereof to be approved, or on which lots on the plan of subdivision, or part thereof to be approved, abut; and
>
> (b) of the intersection with public streets and roads of all proposed streets and roads that are not to be owned and maintained by the Province."

At the time of the decision by the Development Officer under appeal and at the time of the hearing, Section 99(1)(b) read as follows:

> "(b) The right of way, alignment and gradients of all proposed streets and roads that are not to be owned and maintained by the Province."

From the evidence the internal road layout proposed for Oakmount Subdivision was acceptable to the Department. All the proposed lots abut the cul-de-sac road internal to the subdivision. The internal subdivision road is a continuation of Brightman Avenue which extends beyond the Town boundary into the Municipality. This existing paved extension of Brightman Avenue provides access for three residential properties. It has been maintained by the Town as though it were part of Brightman Avenue, apparently owing to some uncertainty about the location of the Town boundary. The Board heard no evidence that the existing Brightman Avenue extension did not qualify as a public highway by the criteria set out in Section 10(1) of the Public Highways Act as follows:

> "10(1) except in so far as they have been closed according to law:
>
> (a) all allowances for highways made by surveyors for the Crown;
>
> (b) all highways laid out or established under the authority of any statute;
>
> (c) all roads on which public money has been expended for opening, or on which statute labour has heretofore been performed;
>
> (d) all roads passing through Indian lands;
>
> (e) all roads dedicated by the owners of the land to public use;
>
> (f) every road now open and used as a public road or highway; and
>
> (g) all alterations and deviations of, and all bridges on or along any road or highway;
>
> shall be deemed to be common and public highway until the contrary is shown."

The only documentary evidence which may indicate that the existing Brightman Avenue extension is not a public highway pursuant to Section 10 of that Act are Exhibits C-8 and C-12, plans showing that the lands of the Appellants include the existing Brightman Avenue Extension.

Counsel for the Appellants identifies two issues in his post-hearing brief, namely whether the Department of Transportation has the power under Section 99 of the Planning Act to refuse approval of a plan of subdivision based on an objection from the Town which has jurisdiction over the streets which will lead into the proposed subdivision, and secondly, whether the Town has the power to deny access to Town streets to the Appellants or to potential residents in the proposed subdivision.

With respect, the basis on which the Department of Transportation decides to approve or to refuse approval for a tentative plan of subdivision is beyond the jurisdiction of this Board to consider. Clearly from the evidence there was controversy and some uncertainty within the Department about how to address the Town's opposition to the proposed subdivision. According to the Divisional Engineer the decision to refuse approval was made by Senior staff in the Department, based on an interpretation of the Provincial Subdivision Regulations.

Whether or not the criteria used by the Department in coming to a decision are appropriate or fair, the issue for the Board is whether the decision of the Development Officer to refuse approval for the tentative plan of subdivision was made in compliance with the subdivision regulations of the Municipality. The Board concludes that the Development Officer properly determined that the tentative plan for Oakmount Subdivision could not be considered to be in accordance with the municipal subdivision regulations because the plan additionally required the approval of the Department of Transportation pursuant to Section 99 of the Planning Act. That approval having been refused, the plan was "clearly contrary to a law.... of the Province of Nova Scotia" and the Development Officer had no ability to give tentative approval.

The Board makes no determination on whether the decision of the Department of Transportation to refuse approval for the tentative plan for Oakmount Subdivision was made without jurisdiction, or in bad faith, or without a proper determination of the Town's right to refuse access, as was alleged in the Appellants' grounds of appeal. The Board determines that the tentative plan of subdivision does not meet the requirements of the Subdivision Regulations of the Municipality.

The Board having visited the site and surrounding area and having considered the evidence and argument in this appeal, for the reasons stated dismisses the appeal and confirms the decision of the Development Officer.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 23rd day of October, A.D., 1987.

EASalton

ELIZABETH SALTON

Oickle v. Town of Bridgewater

PLANNING--ZONING AMENDMENT--APPROVAL OF REZONING FROM R-1 TO NC TO PERMIT CONVENIENCE STORE--WHETHER AGGRIEVED PERSONS--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, SS. 63(1),(3),(5)--TOWN OF BRIDGEWATER MPS, POLICIES 5.11, 9.3, 11.7, 16.6

This is an appeal by P.C.O. and a number of other residents of Pinecrest Subdivision, as aggrieved persons, from a decision of the Council of the Town of Bridgewater rezoning a corner lot from Residential Single Family (R-1) Zone to Neighbourhood Commercial (NC) Zone to permit the development and operation of a convenience store. Having heard evidence from H.W. that she and her husband live directly across the street from the subject property, the Board believes that they as owners of a residential property in close proximity qualify as aggrieved persons. The Board has jurisdiction to hear the appeal on the merits. The subject property is 30,336 sq. ft., wooded, somewhat lower than road level, surrounded by heavily wooded undeveloped land zoned R-1, and is within the Town's Municipal Planning Strategy (MPS).

HELD: The Board confirms the decision of Council and dismisses the appeal.

The Board is governed by ss.63(3) and (5) of the Planning Act and must determine whether the decision of the council reasonably carries out the intent of the MPS. The criteria for neighbourhood commercial use in residential areas set out in Policy 5.11 of the MPS have been met. The nearest convenience store is 1.2 km. away and the Board accepts that the Pinecrest Subdivision is the principle target market. None of the uses in a Neighbourhood Commercial Zone would be noise generating other than through some automobile and truck traffic. There is unlikely to be traffic congestion. There is a separation from the immediate residential area. This location of a neighbourhood commercial use would not be an intrusion into the residential character of the area that would cause it to be degraded. Similarly the proposed commercial use is not inappropriate by the criteria of MPS Policy 16.6. The decision of Council reasonably carries out the intent of the MPS.

NSMB-565-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983 Chapter 9;

- and -

IN THE MATTER OF: An appeal by PETER C. OICKLE et al from a decision of the Council of the Town of Bridgewater made November 4, 1986, which amended the Land-use By-law by rezoning lands at the corner of Jubilee Road and Exhibition Drive from Residential Single Family (R-1) Zone to Neighbourhood Commercial (NC) Zone.

BEFORE: ELIZABETH SALTON, Member

COUNSEL: PETER C. OICKLE, on behalf of the Appellants;

KENNETH O. THOMAS, LL.B., on behalf of the Developer, Aubrey P. Dakin

KENDALL J. KENNEY, Q.C., NANCY PEERS, LL.B., and JANIS NAUGLER, Articled Clerk, on behalf of the Town.

DECISION

The hearing of this appeal took place in the Council Chambers of the Town of Bridgewater on March 25, 1987. Notice of Appeal (Exhibit O-1) dated December 15, 1986 was received by the Board on December 17, 1986. At the request of the Board an amended Notice of Appeal (Exhibit O-2) dated January 2, 1987 was filed with the Board on January 8, 1987. The Appellants are residents of Pinecrest Subdivision in the Town of Bridgewater (the Town). Mr. Peter C. Oickle of 57 Marlboro Drive was authorized to represent the following persons:

Ivan Wambolt
Helen Wambolt
Fred McCallum
Coralyn McCallum
Byron Tanner
Edith Tanner
Verlene Publicover
John Spindler
Randolph Blair
Kelly Blair
William MacGregor
Margaret MacGregor
Robert Comeau
Shirley Comeau
H. Malik
C.M. West
Dorothy Simpson
John Simpson

The appeal was filed pursuant to Section 63(1) of the Planning Act which states:

> "63(1) The amendment, revision or refusal by a council to amend or revise the land-use by-law pursuant to subsection (1A) of Section 51 may be appealed by
>
> (a) an aggrieved person;
>
> (b) the applicant;
>
> (c) the Director;
>
> (d) the council of an adjoining municipality."

The grounds of the appeal set out in the Notice are as follows:

> "Municipal Development Plan and Zoning By-Law, Town of Bridgewater which states:
>
> Section 5.11
>
> "Neighbourhood Commercial uses such as grocery stores and convenience stores may be permitted in residential areas through Zoning By-law amendments, provided that

> a. Such uses are located on arterial or collector streets, as shown on Map 3, Street Classification Map;
>
> b. The service for such use is primarily the surrounding area;
>
> c. No adverse effects such as noise, traffic congestion or illumination will result in the residential area;
>
> d. The residential character of the immediate area will not be degraded."
>
> It has been the concern of the residents that there will be increased noise, traffic and litter in and around the immediate and not so immediate areas. As well, concern has been expressed that the residential character of the immediate, and not so immediate area will be degraded. Further, there has been repeated representation by a large percentage of the residents and on their behalf opposing this store."

The Board satisfied itself that all preliminary matters necessary to the Board assuming jurisdiction to hear this appeal, with the exception of the status of the Appellants as aggrieved persons, had been carried out in accordance with the requirements of the Planning Act, the Municipal Board Act and the Board's regulations.

The Board heard evidence on the standing of the appellants from Peter C. Oickle and from his mother, Helen Wambolt, who lives on a property directly across Jubilee Road from the property which is the subject of this appeal. Counsel for the Town raised no objection to the Appellants' standing before the Board. Counsel for the Developer similarly raised no objection to the Appellants being granted standing although he pointed out that any detrimental effect from the proposed development would vary according to the distance from the subject property. From the evidence of Mrs. Wambolt, the Board believes that she and her husband, as owners of a residential property in close proximity to the subject property, qualify as aggrieved persons. Having made this determination that Ivan and Helen Wambolt are aggrieved persons the Board was able to assume jurisdiction to hear the appeal on the merits which it did with no objection from the parties.

The appeal is from a decision of the Town Council which amended the Land-use By-law by rezoning the subject property from Residential Single Family (R-1) Zone to Neighbourhood Commercial (NC) Zone to permit the development and operation of a convenience store. The subject property is located in the south end of the Town on the west side of Exhibition Drive at the corner of Jubilee Road. To the South of this intersection Exhibition Drive is continued as Desbrisay Drive, a residential street in Pinecrest Subdivision. The Appellants live in the Pinecrest Subdivision.

The subject property is 30,336 square feet in size with a frontage of 114 feet on Jubilee Road and a frontage of 173 feet on Exhibition Drive. The property is wooded and somewhat lower than road level at the intersection. It is surrounded by heavily wooded undeveloped land zoned R-1. Across Exhibition Drive from the subject property on the corner lot is the Bridgewater Open Bible Church. On the southeast of the intersection is an undeveloped residential lot. On the southwest of the intersection is the Wambolt property.

Mr. Oickle gave evidence on behalf of the Appellants and called one witness. Mrs. Wambolt gave evidence at the request of the Board. Counsel for the developer called Mr. Dakin. Four persons gave evidence for the Town.

Mr. Peter Oickle stated that a principal concern of the Appellants was a perceived threat to the quiet enjoyment of their properties which could result from Town Council's decision to rezone the subject property. Mr. Oickle described Pinecrest Subdivision as a predominantly single-family development with only one small apartment building which had the appearance of a single family dwelling. He filed a series of photographs (Exhibit 0-10) which he has taken himself in January 1987 showing the subject property and surrounding area.

Mr. Oickle referred to Policy 9.3 of the Town's Municipal Planning Strategy (M.P.S.) which states:

> "The South End shall be regarded as a developing residential neighbourhood whose further stages shall be subject to the availability of trunk water and sewer services."

He expressed concern about the proposed location of the convenience store at the northwest corner of the property which is the lowest point of the property. The Town Engineer had anticipated that this location might present difficulties in connecting to municipal water and sewer services. Mr. Oickle felt that the Engineer's comments might lead the developer to locate his store in another area of the property which could be closer to existing development.

Mr. Oickle referred to Policy 5.11 of the M.P.S. which states:

> "Neighbourhood commercial uses such as grocery and convenience stores may be permitted in residential areas through Zoning By-law amendments, provided that
>
> a. Such uses are located on arterial or collector streets, as shown on Map 3, Street Classification Map;
>
> b. The service area for such a use is primarily the surrounding residential area;
>
> c. No adverse effects such as noise, traffic congestion or illumination will result in the residential area;
>
> d. The residential character of the immediate area will not be degraded."

Mr. Oickle agreed that the proposed convenience store might be intended to serve primarily the Pinecrest Subdivision which is "the surrounding residential area". He stated that the residents of the area were opposed to the facility and also that the store could serve a much wider area. If its location encouraged business from beyond the immediate neighbourhood he believed that it could not qualify as a "neighbourhood convenience store". He felt that the two existing convenience stores, each a little over a kilometre away from the intersection of Jubilee Road and Exhibition Drive, were sufficient for the needs of the residents of Pinecrest Subdivision.

Mr. Oickle expressed concern about the effects of increased traffic on the safety of the intersection of Jubilee Road and Exhibition Drive/Desbrisay Drive, particularly if the proposed store attracted customers from the Hebbville area to the west which can be reached by Jubilee Road. He was also concerned about the potential degrading of the value of residential properties in the immediate area because of litter from the store and increased traffic. He anticipated that the rezoning to permit a convenience store would change the character of the surrounding residential area, perhaps leading to more commercial development or higher density residential development. In summary, he expressed the view that the Town had not shown "beyond doubt" that the proposed store would not have an adverse effect on the neighbourhood because of resulting traffic litter and noise.

In cross-examination, Mr. Oickle agreed that a petition opposing the rezoning of the subject property had been circulated and signed before a public information meeting was held. He conceded that the intended area to be served by the proposed store was Pinecrest Subdivision, and that the service area for the store could be "primarily" the immediate neighbourhood without being exclusively that neighbourhood. Mr. Oickle's main concern was for the value of the homes and the possibility of the neighbourhood being "degraded".

Mr. Fred Dalley, a real estate agent in Bridgewater, gave evidence on property values in Pinecrest subdivision and area. He said that the corner lot at Jubilee Road and Desbrisay Drive, diagonally opposite the subject property, had been on the market for 3 years and had just recently sold for less than its appraised value. It was Mr. Dalley's opinion that residential properties within a 500-600 foot radius of the subject property would not "hold their value" if the proposed convenience store proceeds.

Mrs. Helen Wambolt who with her husband Ivan has lived at 8 Desbrisay Drive across Jubilee Road from the subject property for two and one-half years was concerned that increased traffic and litter would result from a convenience store and that her property would accordingly be devalued.

She agreed that only her kitchen window faced the subject property and that their home had never been professionally appraised. She and her husband had no immediate plans to sell, the home having been built as a retirement home. Mrs. Wambolt had experienced litter problems with two previous homes which had been in the vicinity of neighbourhood stores.

The Applicant, Mr. Aubrey Dakin, who has lived at 56 Marlboro Drive in Pinecrest Subdivision since 1979 explained his plans for the proposed convenience store. Mr. Dakin has been "in the food business" for 22 years and currently works in a store in Lunenburg since his position with Dominion Stores in Bridgewater terminated.

Mr. Dakin has an agreement of purchase and sale with the owners of the subject property conditional on the rezoning of the property. He said that he intended to construct the store in the rear northwest corner of the lot with no windows facing the Wambolt property. Much of the existing tree cover would remain to "shade residents from some of their fears". The store will have 1,000 square feet of floor area, the maximum allowed in the land-use by-law for the Neighbourhood Commercial Zone. There would be two entrances to the property which would need Police Department approval. The connection to Town water and sewer would be to services on Jubilee Road. If a pumping station were needed because of the elevations, Mr. Dakin said that was acceptable to him.

Mr. Dakin anticipated servicing Pinecrest Subdivision with his store. He believed it would be a mile closer to the subdivision than any other facility and yet would not be located in the subdivision. Mr. Dakin believed he had the support of some Pinecrest residents.

In cross-examination, Mr. Dakin agreed that he was not obligated to retain trees on the property and that traffic could use his paved parking area as a shortcut to avoid the Jubilee/Exhibition/Desbrisay intersection, although he intended to chain off the entrances after store hours so that it did not attract parking or traffic. Mr. Dakin anticipated that 2% of his business might come from areas other than Pinecrest. If filling on the lot or paving of the parking area caused trees to be lost he said that he was prepared to re-plant.

Mr. Peter M. Oickle, Director of the Lunenburg County Planning Commission, reviewed his report to Council (Exhibit O-4) on the rezoning application and analyzed the proposed development in relation to the Town's M.P.S. and Land-use By-law. He had recommended approval of the application in his report and continued to believe that it met the intent of the M.P.S..

Mr. Oickle confirmed that Jubilee Road was a designated arterial street and Exhibition Drive was intended to be arterial by Policy 11.7 in the M.P.S., thus the location satisfied subsection (a) of Policy 5.11 which enables Council to consider rezoning lands from Residential to Neighbourhood Commercial.

In regard to the service area for a neighbourhood commercial use, Mr. Oickle that there was no way to determine the extent to which the proposed store would serve the immediate area and the M.P.S. does not require that this be quantified.

In regard to adverse affects as set out in Policy 5.11(c), Mr. Oickle said that such a relatively small commercial activity would add to the traffic volume to some extent but he felt that it would be unlikely to result in an adverse affect. Similarly, he anticipated that any lighting on the subject property would be for safety and security reasons only and would be unlikely to adversely affect existing development because of the intervening distance.

In regard to the possible degrading of "the residential character of the immediate area" (Policy 5.11(d)), Mr. Oickle felt that any commercial use would have some influence on a residential area but that the degree of influence is related to the scale of the commercial use. In this case he did not consider that there would be a qualitative change because of the intervening street network which ensured distance between the subject property and existing residential development.

In Mr. Oickle's opinion, a Neighbourhood commercial zone could be an advantage to a residential area because such a use contributed generally to road safety, accessibility and energy conservation by providing a service to the immediate neighbourhood. These advantages were increased if such a small scale commercial use was located in a highly accessible area.

In cross-examination, Mr. Oickle agreed that whether or not a neighbourhood commercial use "primarily" served the surrounding residential area was a subjective matter.

Maurice Lloyd, an engineer and an expert in municipal planning, had reviewed the rezoning application, the report by the Director of the Planning Commission and the Town's M.P.S. and Land-use By-law. He had concluded that Council's decision reasonably carries out the intent of the M.P.S. and is consistent with its policies. He believed the project reasonably met the criteria set out in Policy 5.11 of the M.P.S. and considered that the benefits would outweigh any negative impact on the character of the immediate area. In his opinion the residential character of an area was not the same thing as the property values of the area. If the proposed development was not landscaped or visually buffered by trees, Mr. Lloyd said he would be "less comfortable" but still considered that the rezoning met the intent of the M.P.S.

John MacIntosh, Town Engineer and Development Officer, confirmed that water, sewer and storm sewer services were all available for the proposed store. In his opinion grading would be necessary on the site in order to connect to the sanitary sewer which lies 6 or 7 feet below grade. If the site received 5 or 6 feet of fill it would be possible to connect to sewer services without pumping. Mr. MacIntosh agreed that traffic would increase as a result of the proposed store but only time would tell the extent of the increase.

Deputy Mayor Ernest Bolivar, a 17-year veteran on Town Council, supported Council's decision because he believed that the store would make Pinecrest a more attractive subdivision and enhance the neighbourhood.

In an appeal from a Council decision which amended the land-use by-law, the Board is governed by Sections 63(3) and 63(5) of the Planning Act which state:

> "63(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy."

> "63(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

In this appeal the relevant policies of the MPS are Policy 5.11 (previously quoted) which sets out the criteria for neighbourhood commercial uses in residential areas and Policy 16.6 which outlines matters to be considered by Council before reaching a decision on an application to amend the land-use By-law as follows:

"16.6 In considering amendments to the Zoning By-law and in considering Development Agreements, in addition to all other criteria as set out in various policies of this Plan, Town Council shall have regard to the following matters:

a. that the proposal is in conformance with the intent of this Plan and with the requirements of all other Town By-laws and regulations;

b. that the proposal is not premature or inappropriate by reason of:

    i. the financial capability of the Town to absorb any costs relating to the development;

    ii. the adequacy of sewer and water services, including fire flows and water pressure, or if services are not provided, the adequacy of physical site conditions for private on site sewer and water systems;

    iii. precipitating or contributing to a pollution problem in the area;

    iv. the adequacy of storm drainage and the effect of drainage areas on adjacent uses;

    v. the adequacy and proximity of school, recreation, and any other community facilities;

    vi. the adequacy of street networks in, adjacent to, or leading toward the development regarding congestion and traffic hazards;

    vii. the potential for the contamination of watercourses or the creation of erosion or sedimentation;

c. that where provided for in this Plan special conditions are imposed as stated in the Zoning By-law, on the proposed development to reduce conflict with any other adjacent or nearby land use by reason of:

    i. type of use;

    ii. emissions including air and water pollutants, vibration, heat, and noise;

    iii. height, bulk, and lot coverage of the proposed building;

iv. traffic generation, access to and egress from the site, and parking;

v. open storage;

vi. signs;

vii. similar matters of planning concern.

d. suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway rights-of-way and other nuisance factors.

e. provision for buffering, landscaping, screening, and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

The Board has visited the subject property and surrounding area and considered the evidence and argument presented by the parties.

The Board believes that the criteria for neighbourhood commercial uses in residential areas set out in Policy 5.11 of the M.P.S. have been met. The subject property is located at the intersection of two arterial streets. The convenience store proposed for the subject property is located on a street bordering a 300-home restrictively zoned residential subdivision which has no other convenience store closer than 1.2 kilometers away. The developer identified Pinecrest Subdivision as his principle target market and the Board accepts that this is realistic. None of the uses allowed in a Neighbourhood Commercial Zone (confectionary, grocery and convenience stores-with or without a dwelling unit - and garden nurseries) would appear to be noise-generating operations in themselves, other than through some automobile and truck traffic from customers and suppliers. A commercial operation limited to 1000 square feet in size seems unlikely to generate sufficient traffic to cause congestion. Evidence from the Town Engineer confirmed that Jubilee Road and Exhibition Drive are arterial streets quite capable of carrying increased traffic. Lighting which might adversely affect the residential area is governed by provisions of the Land-use By-law controlling illumination and illuminated signs, by the restricted size of the commercial operation and by the required setbacks for any building in a Neighbourhood Commercial Zone. The separation of the subject property from the immediate residential area which lies across Jubilee Road would minimize any impact on the residential character of Pinecrest Subdivision. The proposed small-scale commercial use is surrounded by undeveloped land and is on the opposite side of the arterial street which forms the northern boundary of a primarily single family residential subdivision. The Board is not convinced that in this location a neighbourhood commercial use would be an intrusion into the residential character of the immediate area which could cause it to be degraded.

With regard to the criteria to be considered as set out in Policy 16.6 of the M.P.S. the Board accepts that the proposed commercial use is not inappropriate by any of those criteria; that there are sufficient controls in the Land-use By-law to reduce any conflict with adjacent or nearby land uses: that the site is suitable for the proposed use; and that the developer's proposals for buffering, landscaping, and screening, if implemented, together with the approvals required for road access, will reduce any potential incompatibility with adjacent land uses and traffic arteries.

The Board determines that the decision of Council reasonably carries out the intent of the municipal planning strategy and therefore dismisses the appeal. Pursuant to Section 63(4)(a) of the Planning Act the Board confirms the decision of the Council of the Town of Bridgewater which rezoned lands at the corner of Jubilee Road and Exhibition Drive from Residential Single Family (R-1) Zone to neighbourhood Commercial (NC) Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of November, 1987.

EASalton

ELIZABETH SALTON
Member

Parkin v. District of East Hants

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-2 TO C-1--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--MUNICIPAL BOARD ACT, S. 16(1)--PLANNING ACT, SS. 2(d), 63(1),(2),(3),(4),(5),(7)--DISTRICT OF EAST HANTS: CORRIDOR DISTRICTS AND MOUNT UNIACKE DISTRICT INTEGRATED P.S., SECTIONS 1, 1.1, 1.4, 1.6, 2.2, 2.3, 2.4.2, 2.5, 9.1, 9.2, POLICIES P2-2, P2-9, P2-10, P2-21, P3-2, P3-17, P4-7, P4-8, P4-10, P4-11, P4-12, P4-15, P4-18, P9-1, P9-2, P9-3, P9-4, P9-5, P9-18

This is an appeal by the applicants from a decision of the Council of the Municipality of the District of East Hants refusing to rezone three lots owned by the Appellants on Highway No. 2 at Elmsdale from General Residential (R-2) Zone to Commercial General (C-1) Zone. The subject lands are a roughly rectangular 2-acre field with a large wood frame dwelling. While the Appellants initially wanted a more extensive commercial development, by the time of this hearing they indicated their only scheme for present development was to change the residential unit into a craft boutique "mall." The lands are included within a Municipal Planning Strategy (MPS). Both the Municipal Planner and the Planning Advisory Committee (PAC) recommended approval of the original application.

HELD: The appeal is allowed and Council is instructed to amend the Land-Use By-law by rezoning the subject property to C-1.

The three main problems concerning the proposed rezoning are compatibility with adjacent land uses, ribbon and leap frog development, and availability of piped services. There may be a clash or lack of compatibility with the present residential use of the adjacent lot to the rear, but satisfactory buffering for this lot could be achieved either by tree planting or by fence installation. The general area is a mixture of light commercial and residential and this C-1 rezoning merely continues the pattern that exists. Small commercial developments are consistent with the intent of the MPS. If the community wishes to stop commercial development that intent should be more clearly spelled out with a change in the MPS. This is not "leap frog development" in that the necessary basic services are there to service the development. While the Planner admits this is ribbon development, he feels it is suitable. The Board, however, regards this particular development as compatible infill in an area in which ribbon development is already established. The Board does have a great deal of concern as to the adequacy of central piped services, but has no real evidence but merely allusions before it as to a problem. The Planner had raised this concern but the Municipality has chosen not to deal with the issue. Based on the only expert planning opinion before it, the proposed rezoning falls within the intent of the MPS. This still leaves the question of whether the decision of Council also reasonably falls within the intent of the MPS. The Board is of the opinion that there are no criteria in the MPS which would support Council's decision.

NSMB-574-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal to the Nova Scotia Municipal Board by **KENNETH** and **AWILDA PARKIN**, from a decision of the Council of the Municipality of the District of East Hants refusing to rezone lots 2A, 2B and 2C located on Highway No. 2, Elmsdale, from General Residential (R-2) Zone to Commercial General (C-1) Zone.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: DAVID ENGLISH, LL.B., on behalf of the Appellants, Kenneth and Awilda Parkin,

ROBERT CARRUTHERS, LL.B., on behalf of the Municipality of the District of East Hants.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, the Municipal Board Act, the Chairman assigned Board Member, Richard L. Weldon, to hear this planning appeal at the Board's October 6, 1987, sittings at the Council Chambers of the Municipality of the District of East Hants, Milford, Nova Scotia (the Municipality of the District of East Hants will hereinafter be referred to as the "Municipality").

The Notice of Appeal was dated March 25, 1987, and filed with the Board on March 26, 1987, together with a written undertaking to pay the costs of advertising the Notice of Hearing. The Board assigned the Chairman to peruse the Notice of Appeal to determine whether or not the Notice of Appeal complied with the Planning Act S.N.S. 1983, Chapter 9, and the rules made thereunder as to the form and content of a Notice of Appeal.

The Notice of Appeal cited as the grounds of appeal:

> "1. That Council's decision does not reasonably carry out the intent of the Municipality of the District of East Hants planning strategy for the corridor area and Mount Uniacke.
>
> 2. That the proposed rezoning does carry out and is in conformatory (sic) with the intent of the planning strategy of the Municipality of the District of East Hants for the corridor area and Mount Uniacke.
>
> 3. Such other grounds as may appear at the hearing of the appeal."

The decision appealed from is a decision refusing to rezone certain lands of **KENNETH** and **AWILDA PARKIN** located on Highway No. 2 Elmsdale, Nova Scotia, known as Lots 2A, 2B and 2C as set forth on a plan showing "Proposed commercial building and land of Kenneth and Awilda Parkin, Elmsdale, Hants County, Nova Scotia" from its existing General Residential (R-2) Zone to Commercial General (C-1) Zone under Section 63(1) of the Planning Act C. 9, S.N.S., 1983, as amended, which decision was made by the Council of the Municipality of the District of East Hants on March 16, 1987.

The Appeal seeks to have the Board reverse the decision of the Council of the Municipality (hereinafter referred to as the Council) made March 16, 1987, refusing to amend the

Municipality's Land-Use By-law and to have this Board order the Council to amend the Municipality's Land-Use By-law by rezoning the lands of the Appellants from existing General Residential (R-2) Zone to Commercial General (C-1) Zone.

The Appeal came on for hearing at 10:00 a.m. on October 6, 1987, at the Council Chambers of the Municipality at Milford, Nova Scotia, pursuant to a Notice of Hearing dated the 31st day of August, 1987.

Service of the Notice of Hearing and advertisement of the Notice of Hearing were all proven (the Municipality conceding) to the satisfaction of the Board.

These are excerpts from the Planning Act (in force at the time the decision was made) sections bearing on this appeal which merit quoting here:

> "Section 63(1)
>
> The ... refusal by Council to amend or revise the Land-Use By-law may be appealed by ...
>
> b) the applicant...
>
> (2) An Appeal filed pursuant to subsection (1) shall be served on the Board within twenty-one days ... of the date of the decision of Council.
>
> (3) The Board shall determine whether the decision of the Council reasonably carries out the intent of the municipal planning strategy.
>
> (4) The Board may
>
> a) confirm the decision of the council;...
>
> c) allow the appeal by instructing the council amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the

> Board determines the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.
>
> ...
>
> (7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by the applicant if, in the opinion of the Board,
>
> a) the applicant would suffer undue hardship; or
>
> b) extraordinary and compelling circumstances are present."

The Appellants in this case are the persons who applied to have their land rezoned and thus they are applicants within the meaning of the above section and have the status of Appellants assuming they have filed their Notice of Appeal with the Board in time. The Appellants in this case have filed their Notice of Appeal with the Board in time. The Board assumed jurisdiction to hear this appeal.

The area sought to be rezoned is approximately a 2-acre piece of land situate on Highway No. 2 in Elmsdale. It consists of by what, by observation, is apparently a 2-acre field, roughly rectangular in shape, occupied towards its northeasterly side by a large wood frame constructed dwelling and otherwise vacant. In fact, on the plan of subdivision, (Exhibit P-13), it consists of three approved lots of land. The existing building is situate on Lot 2B which has a frontage on the northwestern boundary of Highway No. 2 in Elmsdale of 75.17 feet. Lot 2B has a depth of 111.06 feet on each side. It has a back line of 75.17 feet. Immediately adjacent to the southwest of that lot is lot 2A which is vacant and has a road frontage of 75.27 feet and an approximate depth of 100 feet. Its rear dimension is not mentioned on the plan but it looks the same as the front dimension. Lot 2C has a front footage of 38.24 feet on the same boundary of Highway No. 2 and is adjacent and to the southwest of Lot 2A at the highway. Lot 2C also goes behind Lots 2A and 2B and is almost a T-shaped lot. Its maximum depth from the highway is 258.75 feet until it meets a contiguous boundary of Lot 3. In this depth its width (except to the extent it is encroached on by lot 2A) is some 66 feet and forms one arm of the "T". It is about 70 feet in width or more when it extends behind Lots 2A and 2B. Immediately to the northwest of this Lot 2C is the Lot 3 which is owned by another person. A major portion of lot 2C and a smaller portion of Lot 2A comprise a 66-foot right-of-way which allows access, inter alia, from lot 3 to and from Route Number 2. Thus it can be seen that a large proportion, perhaps as much as a third, of the area of the land to be rezoned is subject to this particular right-of-way to Lot number 3. There is a built or used road approximately half of the 66-foot width which is built from the northwestern boundary of Highway No. 2 until it services Lot No. 3. A view of the site shows a gentle slope of the land from the boundaries of Lot 3 down onto the boundary of No. 2 Highway. There is a house constructed on Lot No. 3 which faces toward No. 2 Highway and has a view across what is now the open field.

Mr. English called Mrs. Awilda Parkin, one of the Appellants, and Mr. Brad Hodgins, the Municipal Planner. Mr.

Carruthers called no evidence and relied on his cross-examination of the witnesses called. Testifying for themselves, without benefit of counsel, were Ms. Rose Seitl, Mr. George A. Hines, Councillor Curtis Clarke, Mr. Daniel MacLeod, Mr. Charles Dillman, and Mr. Andrew Tannahill. Mr. English and Mr. Carruthers made opening remarks to the Board.

At the end of the hearing Mr. English and Mr. Carruthers made argument and the Board set October 19, 1987, at the latest, for each to file a post-hearing memorandum and each to exchange with the other his memorandum. The last of these memoranda were delivered on or about the 21st day of October, 1987. The Board adjourned the hearing at approximately 5:00 p.m. and reserved its decision and took a view of the site. The Board is now delivering its reserved decision.

Mrs. Parkin testified that she lived in Enfield and that she and her husband had bought the subject property with a view to using it to provide them with retirement income. At the time of purchase they were aware that it was zoned R-2 and they contemplated the maximum building which was permissible as-of-right at the time as 6 residential units which would allow some considerable income. Mrs. Parkin pursued this type of development and attempted to negotiate with the then owner of Lot No. 3 concerning adjustments in the right-of-way over the Parkin lots. She wished an exchange of land and she mentioned the details of this requested exchange. A deal was not made between her and the then landowner of Lot No. 3. Mrs. Parkin felt that the terms dictated by the then landowner were much too onerous to allow her to build the proper type of R-2 dwellings on the approved lots that she now held. In any event no deal was made between the Parkins and the people then occupying Lot 3.

Mrs. Parkin then looked to commercial use of the property. She said she checked with the planners at the Municipal Office to make sure that she did all that was necessary to achieve this goal and found that to achieve legal commercial use on this property she would need to rezone the property to C-1. Mrs. Parkin very carefully then went forward and negotiated with Steadman's concerning a retail outlet to be located on the subject lands as well as with various financial outlets concerning rental space for their operations. Mrs. Parkin came up with a scheme whereby she would place a 3,000 square foot retail outlet on the northeastern boundary of the 66-foot right-of-way and she would install the parking for that commercial development on the residue of Lot 2A and that she would make a boutique and or perhaps a restaurant out of the existing dwelling. She then applied for the rezoning which was turned down by Council after all the appropriate processes had been gone through.

Mrs. Parkin made some indication that she had not been as fully heard by Council as she felt she was entitled to be heard. If Mrs. Parkin has any complaint in that regard, her remedy does not lie with the Board. In any event, and on the evidence before it, the Board doubts that there was any refusal by the Council to hear Mrs. Parkin. Prior to the public hearing and preceeding the Council's decision against her, Mrs. Parkin had received positive recommendations for this rezoning both from the Planner and from the Planning Advisory Committee (PAC) that her property should to be rezoned.

By the time of the Board hearing Mrs. Parkin said "At this time" she no longer desired the rezoning to encompass the full proposal which she had put before Council. That proposal would not necessarily be pursued by her at this time if the rezoning were now approved. The only scheme that she had in her mind for present development was the changing of the residential unit that already existed into a craft boutique "mall" in which she would rent out the different rooms to different craft persons.

Mrs. Parkin emphasized that in her opinion she felt that the necessary buffering to minimize land use conflicts generated by her proposal could be accomplished by the installation of a pine tree hedge along the common boundary of the Lot 3 to the rear. She felt that a pine tree hedge would be the appropriate form of quick growing buffer. Mrs. Parkin felt that all the necessary requirements for the rezoning had been met and that she felt that both her proposals were each fully within the intent of the Municipal Planning Strategy and that a rezoning ought to have been granted by Council and should now be ordered by the Board.

The Planner, Mr. Brad Hodgins, filed a curriculum vitae stating his qualifications as a Planner entitled to give opinion evidence on planning matters as they affected the Municipality and in particular the land in question. Both counsel agreed that he was so qualified as an expert and the Board found him to be such. Mr. Hodgins described the entire planning process through which this application had proceeded and said that both the more full proposal presented to Council or the one that Mrs. Parkin was proposing at the present hearing fell within the intent of the MPS. After his study of the matter and even after hearing the evidence herein, he continued to recommend that the matter should go forward and that the rezoning should be granted. Mr. Hodgins was of the opinion that both he and Council could study the worst case scenerio on rezoning rather than the actual proposal before the Council and indeed all counsel agreed that this was the position. Mr. Hodgins used as an example of worst case scenario the fact that a tavern could be built under the proposed rezoning but he felt that the economics of the community and the economics of the site would prohibit a tavern being built on this property even if the rezoning were granted.

Mr. Hodgins had some concerns with the proposals in the form they went before the PAC and he made inquiries and specifically inquired into the availability of sewer and water services within the serviced area. He inquired of the committee of the Municipality that he felt had jurisdiction in such matters. That committee did not reply. Eventually a report was put to the PAC recommending approval of the proposals and this was forwarded to Council under the signature of Mr. Hodgins and the signature of the Chief Administrative Officer of the Municipality, Mr. Glover. (The Board will now continue to summarize the evidence of the other witnesses and will get into the detail of the reported proceedings well compiled by the Municipality and embodied in Exhibit P-7 at a later portion of this decision.)

In summary Mr. Hodgins said that the decision to rezone would fall within the intent of the MPS and that the decision refusing rezoning was outside the intent of the MPS and repugnant thereto. He said that was his opinion given to the PAC and to the Council and that it is his professional planning opinion at the hearing of this appeal.

Rose Seitl of 670 No. 2 Highway, Elmsdale said that she had attended all the public meetings concerning this particular proposal, that she felt that the commercial development of the subject lands would have an undue impact on the future of her community, and it would result in helter skelter development. The available land and building areas of the community are not conducive (according to Mrs. Seitl) to this type of development. Her main point was that the Council was correct in its decision. She noted that there was now a local paper which kept all persons informed of these planning matters and the public had become more active in rezoning matters. She noted that the future land-use map designated this area to be developed as residential rather than as commercial. Mrs. Seitl brought forward opinions which she said were those of the local ratepayers association which opposed this particular application.

Mr. George Hines, retired, lives adjoining the land in question and in his phrase is "death against" the rezoning. He noted that there was a C.N.R. crossing just opposite the No. 2 Highway from the entrance to the 66-foot right-of-way. He feels there is no room for commercial development in the area.

Mr. Curtis Clarke, the Councillor for the area, said that he had been fully involved in the planning processes for the various communities and on the steering committees which set up the original Municipal Development Plan (MDP). He felt that all areas had their full say and that the Advisory Committee had included persons in all occupations and walks of life. His opinion, based on this work, was that the intent of the MPS is consistent with the proposal (the one refused by Council) and also with the decision refusing that proposal made by Council: both are consistent with the intent of the MPS. He said the right decision was made by the responsible Board, i.e. Council, and he felt that the procedures used by Council protected all persons' rights. Councillor Clark felt the Council came to the right decision after public input. He said perhaps the MPS should be amended if that is not the case. He concedes that there is a need in the community for the taxpayer ratio to change to a heavier percentage of commercial and industrial assessment and a consequent lesser ratio of residential assessment and Council should act to change that percentage ratio but he says not here and not in this part of the community. He says that this development constitutes leap-frog and ribbon development, which types of development are prohibited by the MPS.

Mr. Daniel Alexander MacLeod, a tool and die maker, said that he lived at 616 No. 2 Highway, Elmsdale, near the subject property, and he strongly opposes the rezoning as he feels there would be too much extra traffic generated by the development. He said the land on the opposite side of No. 2 Highway was originally proposed to be zoned commercial but was actually zoned residential at the request of its owner.

Mr. Charles Dillman lives adjacent to the buffer zone of the 66' right-of-way over the subject land and said that the pine hedges proposed would be much too small, would be wrong and he therefore opposes the proposed rezoning.

Mr. Andrew Tannahill purchased the home in the rear of the subject lands (Lot 3) on April 30, 1987, subsequent to the Council's decision. He saw the property in front but he when he purchased Lot 3 did not realize that it was going to be used for commercial use in the future. He wants his present privacy continued and therefore he opposes the scheme of the Appellants. Mr. Tannahill was the last of the witnesses heard by the Board.

Exhibit [illegible] is basically the file of the Municipality concerning this application and a quick summary of some of the documents contained therein may be useful in dealing with this matter.

Prior to November 17, 1986, Mrs. Park[illegible] obviously made an inquiry by telephone concerning rezoning. On November 17, 1986, Mr. Brad Hodgins (with copies to the building inspector, the development officer, the Clerk and the local councillor and the Chairman of the PAC), replied to Mrs. Parkin's telephone inquiry in part as follows:

> "Mr. Young has already outlined the requirements to Mr. R. Jardine who also called in this matter. However, permit me to summarize:
>
> 1) Letter to Mr. Glover, Clerk, containing your request, reasons for the rezoning and clear statement that you are the registered property owner,
>
> 2) Enclosed cheque to the Municipality for advertising,
>
> 3) I take over and prepare staff report and recommendation first to Planning Advisory Committee and then to Council,
>
> 4) Advertising the hearing proceeds.
>
> 5) Public hearing held.
>
> 6) Mandatory appeal period (21 days) expires.
>
> 7) Development building permits are applied for and issued.
>
> The above-described chain of events is a generalized route of a successful rezoning application. The procedure can take three months and although if an appeal is filed, development cannot proceed until the appeal is heard and a decision rendered by the Municipal Board...".

By letter dated of December 1st to Mr. Glover, Mrs. Parkin indicated that they were applying to rezone lots 2A, 2B and 2C from present R-2 to C-1 zoning. She also noted that she was negotiating with a financial organization and national retail clothing outlet for rental purposes. She enclosed her cheque. By letter of December 8th Mr. Hodgins replied ...

> "The PAC meets the first Tuesday of every month, and it is my intention to present a complete report and recommendation at the January meeting. However, the following information must be received if the above suggested timing is to be adhered to:
>
> Plot plan of the property showing - location of buildings, existing and proposed - location of extented parking areas - driveways - location of signs to be positioned - lot and size - intended square footage of buildings - how the existing dwelling will be used.
>
> Explanation as to subdivision lot consolidation intentions - description of any easements and rights-of-way on property which influence the development of the commercial site."

This letter again was copied to the persons listed in the original correspondence. On January 9th Mr. Hodgins wrote to Mrs. Parkin concerning a staff report:

> "A staff report and recommendation cannot be prepared until additional information is received in this office well in advance of January 27th...".

On January 7th, 1987, Mrs. Parkin sent in a letter responding to his letter of December 8th and this proposal went to Council and dealt with proposed structure size, proposed parking areas, proposed traffic flow, proposed sign location, proposed culvert location, existing building of floor and proposed parking areas. According to the minutes on January 29, 1987, the PAC dealt with the rezoning of lands of Kenneth and Awilda Parkin and basically recommended the rezoning be passed for advertising. The staff report signed by Mr. Hodgins was fairly complete and started with the recommendation:

> "That the rezoning of the lands of Kenneth and Awilda Parkin Lots 2A, 2B and 2C (E.H. Plan No. 3625), located at Highway No. 2 at Elmsdale, From General Residential (R-2) Zone to Commercial General (C-1) Zone be APPROVED BY MUNICIPAL COUNCIL."

In the information section he states:

"The purpose of the rezoning is to enable the construction of a two unit commercial building on an as yet to be consolidated lot, and secondly, to permit the conversion to commercial usage of the main floor of an existing dwelling located on Lot 2B."

In the analysis portion of his report he states:

"The Integrated Planning Strategy designates this area as a future residential growth area (P2-2.1, page 53), which is carried through in the General Residential (R-2) Zoning. Strategy policy P9-5 on page 193, enables the consideration of commercial rezoning within this designation. The rezoning evaluation criteria are found in P9-1 page 188, and there are three criteria of note:

1) adequacy of central piped services.

2) creation of leap frog, scattered or ribbon development pattern.

3) compatibility with adjacent land uses.

The applicant has been advised of the municipal central services over-capacity situation, which could preclude consideration of the (C-1) zone provision (page 79 of L.U.B.) of "2/3rds of the total square footage of a commercial building used for residential land uses". The applicant intends to provide two washrooms for the two unit commercial building and no residential uses are contemplated. The existing single family dwelling on Lot 2B is already serviced with piped sewer and water. The commercial renovation to this building would result in an additional washroom.

The possible issue of ribbon development along this stretch of public highway is normally viewed in terms of impairing the ability of an arterial road to efficiently move through traffic, and secondly, in terms of detracting from the integrity of a built-up core area. While the volume of through traffic using Highway No. 2 is increasing, there are already many uncontrolled turning movements to and from adjacent commercial and residential properties. Dept. of Transportation has been asked to comment upon this factor, although the planning opinion is that this

> application will not impair the arterial function of the highway.
>
> The application does not negatively impact or threaten the concept of a built-up commercial core, such as it exists. The commercial focus of the Elmsdale community radiates along Hwy. No. 2 from the Nine Mile River bridge and up to the Rennison property recently granted a commercial rezoning. The focus also radiates along Hwy. No. 214 with two business clusters one from the Royal Bank to the junction of Highways 2 and 214 and the other at the Elmsdale shopping centre.
>
> The third cited criteria of compatibility with adjacent land uses, specifically the dwelling on Lot 3 at the back and the dwelling on Lot 1 to the east, is of some concern. The right-of-way easement to Lot 3 must be kept clear and not compromised to provide access to the dwelling on Lot 3.
>
> The incompatibility of having the proposed parking areas abut the sideyards of the two adjacent residential properties is a valid concern. This issue can be addressed by the development officer through the zoning provision "Standards for Parking Areas", Part 6, Sect. 22 (page 41, L.U.B.), ensuring a fence is constructed along the parking area limits in the aforementioned yard areas. This may mitigate the undesirable appearance of an extensive parking area abutting residential property.
>
> The handling of the parking requirements is vague. The proposed structure needs 18 public spaces or 2,880 square feet. The front yard area of Lot 2A is only capable of handling 8 to 10 vehicles in order to maintain a travelled way to the back parking area. The rear public parking area is only feasible if a direct public entrance to the building is provided. The combined parking areas exceed the minimum parking requirements of the By-law, but will it work?
>
> An on-site parking and traffic circulation plan has been requested from the applicant to clear-up any outstanding matters in this regard."

Attached to this report is a "Development Officer's Comments". Interestingly enough, he deals with a proposal number 1 and a proposal number 2. Proposal number 1 is for a lot consolidation of Lot 2A and 2C for the construction of a new commercial building of some 3600 square feet. Proposal number 2 deals with Lot 2B alone its existing dwelling and allows for the conversion of the existing dwelling to some commercial use. It is interesting to note that this proposal number 2 approximates the proposal Mrs. Parkin (according to her testimony before the Board) wishes to proceed with at this time.

Mr. Hodgins on January 29, 1987, inquired of the Regional Divisional Engineer of the Department of Transportation concerning the impact of this development on Provincial Highway No. 2. He received a positive recommendation for the development from that particular individual.

By letter of February 16, 1987 he wrote to the Municipal Works and Properties Committee of the Municipality concerning a large number of applications among which is that of Mrs. Awilda Parkin. His letter concerned this particular application among others and it questioned the adequacy of municipally approved sewer and water services to service the Parkin development. Interestingly enough, he never received a reply to this particular inquiry. On Tuesday, February 24, 1987, on motion of Councillor Clarke and Mr. Canavan it was recommended to send to Council the Parkin rezoning application without a recommendation because of insufficient information provided with the application.

On February 24, 1987, an additional report was filed with the PAC as a planner's report showing that the necessary advertisement had been carried out. On February 26, 1987, Mr.

Hodgins very clearly pointed out that a detailed plot plan was required by him from Mrs. Parkin.

On March 16, 1987, there was a public hearing before Council and item number 3 in the Minutes of Council is entitled "Lands of Kenneth and Awilda Parkin, Elmsdale". Councillor Clarke made a motion that the application of Kenneth and Awilda Parkin to rezone Lots 2A, 2B and 2C from a General Residential, Single and Two Family (R-2) Zone to a General Commercial (C-1) Zone be denied and the motion was seconded by Councillor McLellan. The question on the motion to deny the rezoning application was called and passed by a majority vote of Council, eight voting in favour and three voting against. The same staff report referred to previously had been brought forward, (updated) and brought to the public hearing which was the Council's last hearing on this matter. It is notable only in the addendum to the report dated March 16, 1987, which deals with the Department of Transportation concerns and the plot plan concerns the addendum shows the outstanding concerns of the planner at least have been met on or before March 16, 1987.

On March 17, 1987, the Municipal Clerk advised Mrs. Parkin that her application had been turned down.

What the Board considers to be the necessary excerpts from the Municipal Planning Strategy and the Land-Use By-law which the Board considered in making its decision are contained in Schedule "A" to this decision.

Mr. English on behalf of the Appellants argued most strenuously that the evidence adduced before the Board disclosed that the rezoning applied for by Mr. and Mrs. Parkin fell totally within the intent of the MPS and the decision refusing the rezoning could not therefore fall within the intent of the MPS.

Mr. Carruthers argued to the contrary. He also argued (as an ancilliary argument) that both the decision to rezone and the decision to refuse, in the facts of this particular case, would fall within the intent of the MPS. In either circumstance this appeal to the Board could not succeed. Mr. Carruthers argued strongly that the Board was unable to interfere with the decision of Council in any way if it could be said that the decision of Council reasonably fell within the intent of the MPS.

The Board has listened carefully to all the evidence given, read and re-read the information contained in the Municipality's booklet and has had regard to the exhibits presented. It has taken a view of the site and tends to agree with the recommendation of the planner that so far as traffic is concerned and insofar as parking problems are concerned, from a safety point of view, this proposed rezoning will not create any change of a substantial nature . The Board is further of the opinion that in his report the planner addressed correctly what the problems were concerning this area which were in essence:

1. ribbon and leap frog development;
2. availability of the piped services; and
3. compatibility with adjacent land uses.

The Board will deal with these in reverse order.

In dealing with the compatibility of adjacent land uses, the Board in this case is taking a fairly narrow view of the word "adjacent" as the Board thinks the planner may have done. The Board is having regard to the uses on the lots to either side and behind the land to be rezoned and the land to the other side of the road. The land to the other side of the road is undeveloped and according to some of the witnesses would have been zoned commercial under the original proposal for a L.U.B. since it was over the railway tracks except that the individual land owner wished it zoned R-2, as a sort of a "holding" zone. The Board will disregard the land of the C.N.R. or behind the C.N.R. right-of-way on the opposite side of the No. 2 Highway from the land to be rezoned. The 66-foot right-of-way should buffer (any property to the southwest of itself) especially if assisted by some fencing or tree line to be placed along the southwestern boundary of the 66-foot right-of-way. The full development according to proposal 1 and proposal 2 (as shown on the Development Officer's section of the report), could cause a clash or lack of compatibility with the present use of Lot 3 situate to the rear. The report of the Planning Officer calls for fencing and Mrs. Parkin advocates installation of a pine tree hedge to alleviate this possible incompatibility of land uses. The Board is uncertain whether the pine tree buffer would constitute sufficient buffering, but concedes that the only lot that needs to be buffered at all would be Lot 3 since it is sort of an "island" lot isolated from its adjacent residential subdivision, has private access, and is isolated from any future through development northeasterly by the developed lots of that subdivision. Lot 3 is a sort of a planning anomaly that has rights to be buffered but its rights to be buffered are not enhanced by any rights of persons living in the subdivision to the rear of Lot 3 to be buffered some more. The Board is satisfied that buffering could be achieved, either by tree planting or by fence installation, between any uses to the land situate along Highway No. 2 to the northeast of the subject land. Any conflict would be mitigated causing no concern of a recognized planning nature.

The Board has considered the anomalous location of Lot 3 (having regard to the tremendous impact that the right-of-way to Lot 3 has over the proper development of the road-fronting subject land) and says that the buffering to the satisfaction of the development officer ought to prevent that any recognizable planning harm to the users of Lot 3. If the subject lands are fully developed in accordance with the zoning and in accordance with the proposals number 1 and 2 together then obviously the view that now exists down across the road and across the railway tracks and into the woods from the house situate on Lot 3 and fronting towards the highway will be impaired. Given the existence of the type of development that is now along Highway No. 2 at the time he purchased Lot 3, the owner of Lot 3 should have contemplated probable construction of duplexes on two of those lots. In fact the construction of duplexes on two of the lots was, according to the evidence given to the Board, discussed in great detail with the previous owner of Lot 3. Any construction of duplexes in the allowed position; on the front lots would have obscured the view of the house on Lot 3 to some extent. The Board does not think that the present owner of Lot 3 can insist on maintaining his present view (from a planning point of view). He must have anticipated (or should have anticipated) that when he bought Lot 3 with the vacant field in front of him, that land would become developed and infilled as has much of Highway No. 2 in a ribbon-like manner. Thus, I suggest buffering to the standards required by the development officer will be enough to protect Lot 3 from any interference he might have received from the proposed rezoning. After some hesitation, the Board finds the proposed rezoning is compatible with the immediately adjacent land uses as defined by the MPS.

As to the more distant adjacent land uses there is no lack of land use compatibility in the sense that the type of development that exists in the general area is a mixture of light commercial and residential and this merely continues the pattern that exists. The mixture will be sharpen land use conflicts for those people immediately adjacent the subject lands but buffering will suffice to protect them and the people less closely involved will not be subjected to any real change in quality. The Municipality has a need to enrich its proportion of commercial development as opposed to residential development in order to bolster the commercial component of their assessment mix. The assessment improvement process of that mixture is apparent to anyone driving along the highway where the mixture is quite, to use a phrase, "freckled" now. If it is the will of the community to stop commercial development that intent should be more clearly spelled out with a change in the MPS. In the reality of this community's context, small commercial developments of this nature are consistent with the intent of the MPS.

There is a prohibition in the MPS concerning leap frog, scattered or ribbon development pattern. The Planner is of the opinion that this is not a "leap frog development" in that the necessary basic services are not jumped but are there to service the development. That is how the Planner, Mr. Hodgins, defines "leap frog" development which, as the Board understands his explanation, is development that goes beyond some accepted boundary such as a servicing boundary and then starts again. The Planner clearly admits that the present development is ribbon development but says that the community is proceeding on the ribbon development pattern and he interprets this as suitable ribbon development rather than unsuitable ribbon development. The Board might characterize what is happening in the proposed project as being compatible infill.

The Board has a great deal of concern as to the adequacy of central piped services. The MPS is full of allusions to the fact that the services may not be adequate for the areas to be served and the planner evinced a logical concern about this in his correspondence related to this application. That concern received no official reply. The report put in by the planner was counter-signed by the Municipal C.A.O. (whether or not the concerns over the central sewer and water supplies were justified). The Municipality, had it wished even at the late stage of this appeal hearing, could have adduced evidence if there was any by responsible persons saying that sewer and water supplies were inadequate for this development. The Board further notes that there could have been easily six (and perhaps twelve) units built as of right under the R-2 zoning so that there may be no additional use of sewer and water over-usage which would flow from as-of-right development. In any event, the Board has really no evidence but merely allusions before it as to a problem in the delivery of piped services to the proposed development. There was ample opportunity for the Municipality to rise to the occasion and to prove that its sewer services and/or water services were inadequate to sustain this development. They chose not to do so. The Board can only make the inference that such silence must mean assent or that no deficiency in piped service capacity exists. The planner raised it, he received no dissent, he decided to proceed rather than to recommend against the application. It is the view of the Board that the planner proceeded appropriately given his avowed concerns expressed in this particular field. The Board, although suspicious that there may be sewer and water problems in this community which might detrimentally affect development until they are cured, can on the evidence before it make no such finding. In consequence the three main concerns addressed by the planner have been met and therefore his recommendation stands uncontradicted, namely that this proposed development and proposed rezoning fits within the intent of the MPS and that his concerns expressed in his earlier report have no bearing on the present applications since they are all met to his satisfaction.

Thus the Board is able to find that based on the only expert planning opinion before it, the proposed rezoning falls within the intent of the MPS.

That leaves only one question for the Board - does the clear majority decision of Council also reasonably fall within the intent of the MPS and thus cannot be questioned by this Board. It is clear in many cases that Council may decide for alternative (a) or alternative (b) with equal freedom when either alternative falls within the intent of the MPS.

The points made by Mr. Carruthers in the supplementary submission have been for the most part dealt with previously in the decision. The Board, however, notes the policy P9-1 (sub-paragraph (b)(vii)) which warns against the creation of a ribbon development pattern and this is a policy on which he relies. The Board has reconsidered and notes that in the detail of the Planner's Report he interprets ribbon development in the context of this MPS as being such development as would impede the arterial traffic function of Highway No. 2. This may be correct. The Board, however, regards this particular development as merely being infill in an area in which the ribbon development is already established for whatever reason. The Board therefore rejects Mr. Carruthers' attempt to sustain the decision of Council under the prohibition against ribbon development in the MPS.

As noted before, it is conceded that the area is all surrounded by residential properties but the buffering that will be provided for, and can be enforced by, the regulations will be adequate to protect the immediately surrounding properties.

Mr. Carruthers seemed to point out that this scheme was designed to make economic profit for the Appellants. Mrs. Parkin made no bones about the fact that she bought the subject land for R-2 development and that wanted the income from the R-2 development. Section 2(d) of the Planning Act provides that fair, reasonable and efficient administration be done "in order that sound development may be encouraged".

Mr. Carruthers seems to think that the buffering would seriously limit the parking space available but the Board does not feel that the evidence before it sustains that position. In any event the parking of any development will have to meet the criteria of the various parking requirements of the MPS and the LUB and that any development of the subject lands will have to be tailored to those requirements.

Mr. Carruthers has made a valiant attempt to show that there are planning criteria in the MPS followed by Council in arriving at their decision herein which permitted Council to go contrary to the planning advice of their Planner in this matter and thus made their decision fall within the intent of the MPS.

The Board has seriously considered this matter, all the submissions and evidence adduced, and is of the opinion that in this matter there are no criteria in the MPS which would support Council's decision.

The decision of Council is not founded on principles set out in the MPS thus the decision of Council cannot be found to reasonably lie within the intent of the MPS and therefore the Board pursuant to Section 63(3) and 63(5) of the Planning Act determines that the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy and pursuant to Section 63(4)(c) of the Planning Act allows the appeal by instructing the Council to amend the By-law to rezone the property of the Appellants applied for by the Appellants from General Residential (R-2) Zone to Commercial General (C-1) Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of November, A.D., 1987.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

EXCERPTS FROM MPS

SCHEDULE "A"

1. The Corridor Districts and Mount Uniacke District Integrated Planning Strategy of the Municipality of East Hants as Amended to April 18, 1986, as approved by the Minister April 30, 1985, approved by Council January 28, 1985.

...The Integrated Municipal Planning Strategy for the Corridor Districts and Mount Uniacke District, (more specifically referred to as Municipal Polling Districts Number 1, Enfield; Number 2, Elmsdale; ...

The ...Integrated Planning Strategy and its companion document, the Land Use By-law have been prepared for the residents and Council ...by the Municipality's Planning Advisory Committee... Each District Steering Committee met regularly and held advertised public meetings in each of the six Districts within the planning coverage area....

INTRODUCTION

1.1 BACKGROUND

...The Planning area consists of the following Districts and are described by Metes and Bounds in Appendix 1:

...District 2 Elmsdale ...

...The principal means for carrying out statements of policy with respect to the control of land use and development is the Corridor Districts and Mount Uniacke District, Integrated Land Use By-law, ...

Council's general goal as conveyed by the Integrated Planning Strategy is the encouragement of orderly growth and development and the maintenance of a high quality of life for the residents of the planning area....

As first priority the Planning Advisory Committee chose the Corridor Districts and Mount Uniacke District Integrated Planning Strategy and Land Use By-law. The rationale includes; the Corridor Districts and District 12 exhibit semi-rural and well established urban concentrations; existing land use controls within this area needed substantial revision, and a sprawling Metropolitan Halifax-Dartmouth was and is continuing to exert urbanization pressures throughout the six District planning area.

The continuity of this approach centers upon the growing intensity of growth pressures either being experienced or anticipated, which will produce an array of similar problems and common responses within the selected six Districts.

....

1.4 CONCERNS AND OPPORTUNITIES

...

Planning must be relevant to the perceived needs and desires of the residents within the planning area, anything less compromises the purpose of the process...

1. Managing Growth

   -Designation of areas best-suited for future residential growth and avoidance of land use conflicts....
   -Reinforce existing mixed land use cores of our villages to increase densities and improve the feasibility of meeting central servicing demands.

2. Lack of or Inadequate Sewer and Water Systems

   -User pay principal of financing community-wide water works and sewer systems is extremely burdensome in small villages and outlying vicinities.
   -Relatively small scale of growth in our urbanizing villages means that the amortization costs of central servicing do not become much easier to bear.
   -Small size and low density of development may mean applying intermediate technologies that are less expensive and less elaborate solutions to providing basic utilities...

...

7. Community and Economic Development

   -As more "exurbanites" choose the planning area as a place to live, demands for community services and facilities will increase.
   -Economic development and the creation of jobs in business and industry must keep pace with residential growth in order to generate high value assessment to offset the costs of providing new schools, water and sewer utilities and other services.
   -Self-determination and strong community spirit are attributes of rural living and village life. Community development efforts must counter the potential loss of social cohesion and historic character of our communities challenged by new growth.

...

2. Addressing the Lack of or Inadequate Provision of Central Servicing

i) To identify ways and means of equitably cost-sharing the provision of central services in designated communities.

...

1.6 The Document

...The Generalized Future Land Use Maps: constitute a legal part of the Strategy.

...

2.2 TWO GROWTH SCENARIOS

...

8. Under the steady growth scenario, three areas of concern may be identified:

1) The sewage treatment capacity of Enfield may be reached or eclipsed by serviced lot demands;

2) the planning area generally contains poor soil conditions for on-site septic system capability and Mount Uniacke District, where the brunt of the unserviced residential development is predicted, is particularly unsuited for on-site services development, and;

3) a growing trend for lake shoreland development in Enfield and Uniacke Districts will give rise to the prospect of lake water pollution as residential development proceeds.

9. Existing commercial land use concentrations are in Shubenacadie village, Elmsdale Village and shopping centre, Enfield village and the vicinity of the junction of highways 14 and 2 in Milford District. Mount Uniacke and Lantz Districts do not have a distinct commercial land use focus per se.

...

11. Business growth opportunities will increase in Enfield and Elmsdale village cores as residential development intensifies in these Districts. More Commercial land uses will be located along Highway 2 between Enfield and Elmsdale communities and the Elmsdale Shopping Centre, already a predominant business focus in the corridor area could emerge as the main focus for business growth if expanded in the 1980's.

...

2.3 FUTURE LAND USE GUIDELINES

...This section establishes the guidelines as to how and why the Generalized Future Land Use Map (Gen. FLUM) designations are applied to the District land use, and the relationship of the designations to the zoning....

4) Future land use designations and corresponding zoning are used to influence development in a manner which better articulates established settlement patterns, encourages infilling and expansion of existing subdivisions and encourages new development in areas with excess central piped services.

...

7) Future land uses are designated in accordance with the principal of "highest and best use" and compatible uses, meaning, for instance, productive resource lands should not be jeopardized by housing development and environmentally sensitive lands such as flood-plains and potential potable water sources should not be endangered by uncontrolled development.

8) The future land use designations and in some cases prezoning capatilize upon natural or built development attributes such as the preservation of high amenity park sites, the clustering of business and industrial land uses or the designation of commercial or industrial lands in the immediate vicinity of existing or proposed major highway interchanges.

...

The RESIDENTIAL SUBDIVISION designation is used to reflect the following:

- To encourage continued residential development within our centrally serviced village cores through infilling and phased expansions of existing serviced subdivisions. The corresponding zone designation, is the General Residential Single and Two Family (R-2) Zone.

...

2.4.2 DISTRICT 2 ELMSDALE, FUTURE LAND USE, GEN. FLUM NO. 2(2a) and 2(2b)

...

The economic base of the District consists mainly of retail and services businesses with a variety of contracting and trucking firms, a lumber mill and an industrial salvaging operation....

...

P2-2 It is a policy of Council to guide future development within Elmsdale District 2 in accordance with Gen. FLUM 2(2a) and 2(2b). This specifically means Council will endeavour to ensure the following future land use patterns:

1) Residential Subdivision: The designation identifies the large land area lying between Highways 102 and 2 and between the Districts 1 and 2 boundary and Tannery Brook as a serviced growth area. Other areas where sewer and water central services are available, are designated and also zoned General Residential Single and Two Family (R-2). Specific lands northwest of Nine Mile River and north of Highway 102 in the Belnan area (Gen. FLUM 2(2b)), and lands abutting Highway 2 and northeast of Nine Mile River are designated for future unserviced residential development and zoned (R-2).

...

3) Commercial: Existing business focus within and radiating from the village core and including the Elmsdale Shopping Centre are designated to reinforce these land uses. Appropriate commercial zoning is applied, and within the village core and along Highway 2, existing residential uses within the Commercial General (C-1) Zone are enabled to convert to Commercial (C-1) uses without zoning amendment.

...

2.5 COMPOSITE FUTURE LAND USE/GROWTH MANAGEMENT POLICIES

...

Elmsdale's water utility excess capacity estimate may well be lower due to current system concerns; pressure variations due to use of a coin operated dispenser and low water levels in the treatment plant reservoir...

...

P2-9 It is the intention of Council to request the Water Utilities to inform the Council when a water utility reaches the demand saturation point, equivalent to within thirty percent of its total capacity. Council at this threshold point shall consider options to accommodate increased service demands or other options.

P2-10 It shall be a policy of Council to examine measures to; redirect serviced building lot demands, consider capital cost options to expand a wastewater treatment plant's capacity, or, other options, at such time as when a wastewater treatment and sewerage system (Enfield, Elmsdale, Lantz, Milford, Shubenacadie) has expanded to within 30% of its treatment capacity.

...

P2-21 It shall be the intention of Council to examine the feasibility of integrating the water utilities of Enfield, Elmsdale and Lantz with a possible Water Utility serving Milford supplied in part from the Hardwood Lands Acquafer (sic).

...

SECTION 3
LAND USE: RESIDENTIAL

...

The predominant land use designation on the Generalized Future Land Use Map (Gen. FLUM's) is redisential (sic). The designation is divided into two classes "Residential Subdivision" and "Rural Residential and Natural Resource".

...

P3-2 It shall be the intention of Council to reflect desirable land uses within the residential designation `Residential Subdivision' on the Gen. FLUM's which will be compatible with and reinforce the residential environment.

The uses shall be limited to the following:

a) Single family detached dwellings and cottages;

b) Conversions of single family dwellings to two family dwellings or to boarding houses;

c) Duplex, Semi-detached dwellings;

d) Limited professional business and home occupations;

e) Playgrounds and neighbourhood parks;

f) Existing mobile home dwellings.

...

P3-17 Consistent with Policy P4-14 it is a common occurrence within the planning area for residents to operate a business from a residence. It's the intention of Council to permit a limited range and limited sizing of business, professional and home occupations to be conducted from a residence within the designation "Residential Subdivision" on the Gen. FLUM's.

...

SECTION 4
LAND USE: COMMERCIAL

...

The importance of commercial development to the economic base of the planning area and Municipality cannot be overstated. Traditionally, business assessments in outlying commuter-shed areas from a metropolitan centre represent a very small percentage of the overall assessment base....
It is Council's intention to actively promote business development, in part, to increase the amount of high value commercial assessment to offset the increasing cost burden of providing expensive infrastructure for rapidly increasing residential development....

Small business growth is an essential element to the future vitality of the village cores within the planning area. It is anticipated that as the communities grow, many specialty retail and services businesses will establish in the planning area, providing jobs and fulfilling unmet local market demands....

Council's objective in this Strategy section is to encourage business development to take place in an unfettered, locally supportive manner, with particular regard for the community context of this development (avoidance of land use conflicts, appropriateness of site location within the community, aesthetically acceptable development and adequate on-site parking).

...

P4-7 It is a policy of Council to establish four commercial zones in the Land Use By-law; (C-1) Commercial General, (C-2) Commercial Highway, (C-3) Commercial Local, and (C-4) Commercial Shopping Centre. It is not the intention to prezone (C-2), (C-3) or (C-4) land uses, but to permit said uses by amendment to the Land Use By-law in conformity with Policy P9-1 of this Strategy.

P4-8 Notwithstanding any other policy in this Section, and in order to protect Restricted Residential Single Family (R-1) Zoned land uses from land use intrusions, it shall be the intention of Council not to permit the rezoning of R-1 lands within the Gen. FLUM designation "Residential Subdivision" to Commercial General, Commercial Highway, or Commercial Shopping Centre land uses. (Underlining the Board's)

...

P4-10 It shall be a policy of Council to permit Commercial Local (C-3) land uses within the Gen.FLUM designation "Residential Subdivision" by Land Use By-law amendment...

...

P4-11 It shall be the intention of Council to permit within the Gen. FLUM designation "Residential Subdivision" 1) an expansion of an existing Commercial Local (C-3) use...

P4-12 It shall be the intention of Council to permit Commercial Shopping Centre (C-4) development within the Gen. FLUM designations "Residential Subdivision" and "Commercial" by Land Use By-law amendment...

...

P4-15 It shall be the intention of Council to permit Commercial General (C-1) development less than 15,000 square feet floor area within both Gen. FLUM residential designations and within the "Commercial designation by Land Use By-law amendment pursuant to the rezoning criteria of Section 9 P9-1.

...

P4-18 It is a policy of Council to consider and may permit the development, redevelopment or expansion of Commercial General and Commercial Highway land uses in excess of 15,000 square feet floor area by development agreement in accordance with the following criteria...

...

9.1 IMPLEMENTATION

In accordance with Section 45 of the Planning Act, the adoption of this Integrated Planning Strategy does not commit Council to undertake any of the projects or actions contained, however, Council cannot take any action within the scope of this Strategy which would, in any manner, be inconsistent with the Strategy or at variance with it.

...

This document is comprised of various maps together with Strategy policies which guide the establishment and subsequent changes to zoning within the Land Use By-law. These maps are found in Volume 2 and are:

a) Generalized Future Land Use Map Series (Gen. FLUM) denoted by the numbering: District number, followed by 2 and the appropriate letter a, b, c....

9.2 LAND USE BY-LAW AND AMENDMENTS

The Land Use By-law is the principal mechanism by which land use policies shall be implemented. It shall set out zones, permitted uses and development standards which shall reflect the policies of the Integrated Planning Strategy as per...

In amending (rezoning) the Land Use By-law Council shall follow specific criteria. Such amending criteria shall ensure that the amendment is:

i) in conformance with the intent of this Strategy;

ii) not premature;

iii) not in conflict with nearby or adjacent uses;
iv) physically suitable, and

v) adequately buffered where required.

P9-1 Therefore, it shall be a policy of Council to: in considering amendments (rezonings) to the Land Use By-law, in addition to all other criteria as set out in the policies of this Planning Strategy, Council shall have regard to the following matters:

a) That the proposed development is in conformance with the intents of this Strategy and with the requirements of all other Municipal By-laws and regulations;

b) That the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Municipality to absorb any costs relating to the development;

ii) the adequacy of municipally approved sewer and water services and utilities or if services are not provided, the adequacy of physical site conditions for private on-site septic and water systems;

iii) the adequacy and proximity of school, recreation, and any other community facilities;...

v) the adequacy of road networks in, adjacent to, or leading to the development;...

vii) creating a leap-frog, scattered or ribbon development pattern as opposed to compact development....

c) That the proposed development is in compliance with the following matters in the Land Use By-law:

i) type of use;...

iii) height, bulk, and lot coverage of the proposed building;

iv) traffic generation, access to and egress from the site, and parking;...

vi) signs;

vii) similar matters of planning concern.

d) Suitability of the proposed site in terms of the environmental features of the site, particularly susceptability to flooding and other nuisance factors...

e) Provision for buffering, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries.

P9-2 In considering amendments (rezonings) to the zoning by-law, Council shall hold a public hearing in accordance with the Planning Act.

P9-3 In considering amendments (rezonings) to the Land Use By-law, it shall be the intention of Council to:

i) request a report from the planner;

ii) refer the matter to the Planning Advisory Committee for their recommendation with respect to the preceeding Policy (P9-1), and any other policies of this Strategy which affect the proposed amendment;

iii) refer the matter where applicable to the appropriate provincial government agencies where special expert advice is required and

iv) comply with all legal requirements concerning amendments to the Land Use By-law as set out in the Planning Act.

P9-4 It is not intended that all land shall be prezoned. Rather, in order to give Council a greater degree of control, the Strategy provides that certain land uses shall be processed as amendments to the Land Use By-law. Such amendments shall be granted only if they meet the policies found within the Strategy and the policies included in this Section, as well as the standards included in the zoning category to which they will be zoned. Council shall not prezone for the following uses:

...

iii) Commercial uses in the Rural Residential and Natural Resource designation;

iv) Commercial Local uses;

v) Commercial Highway uses;

vi) Commercial Shopping Centre uses...

P9-5 The following uses shall only be considered by amendment to the Land Use By-law:

1) Within the Residential Subdivision designation:...

d) Commercial uses;

...

P9-18 It shall be the intention of Council, for the purposes of public notice and the comprehensive implementation of this Strategy, to place notices each year within circulating newspapers in the planning area, informing the general public that all proposed land use developments within the planning area must conform to the requirements of the Integrated Planning Strategy and Land Use By-law.

EXCERPTS FROM
LAND USE BY-LAW

...

PART 2: DEFINITIONS

...

e) Commercially Converted Dwelling means a residential dwelling part or all of which has been converted to a permitted commercial use in the particular commercial zone.

...

37. Floor Area

...

b) Commercial Floor Area means the total usable floor area within a building used for commercial purposes but exclusive of washrooms, furnace and utility rooms and common areas between stores.

c) Gross Floor Area means the aggregate of the floor area of a building above or below grade, measured between the exterior faces of the exterior walls of the building at each floor level but excluding car parking areas within the building.

...

60A. Municipally Approved Central Piped Services means municipally approved central sewer and/or water services owned or intended to be owned by the Municipality.

...

64. Parking Area means an open area containing parking spaces, other than a street, for two or more motor vehicles, available for public use or as an accommodation for clients, customers or residents and which has adjacent access to permit ingress or egress of motor vehicles to a street or highway by means of driveways, aisles or maneuvering areas where no parking or storage of motor vehicles is permitted.

...

66. Parking Space means an area of not less than one hundred and sixty (160) square feet, measuring eight (8) feet by twenty (20) feet exclusive of driveways or aisles, for the temporary parking or storage of motor vehicles, and which has adequate access to permit ingress and egress of a motor vehicle to and from a street or highway by means of driveways, aisles or maneuvering areas.

...

76. Retail Store means a building or part thereof in which

goods, wares, merchandise, substances, articles or things are offered or kept for sale directly to the public at retail value.

...

81. Shopping Centre means a separate use of land containing a building or building complex on a lot designed, developed and managed as a unit by a single owner or tenant, or a group of owners or tenants containing an inter-related group of commercial uses, distinguished from a business area comprising unrelated individual uses and characterized by the sharing of common parking areas and driveways.

...

92. Zone means a designated area of land shown on the schedules of this By-law and in Appendix 2-C.

...

Part 3: ZONES AND LAND USE BY-LAW MAPS

3.1 Zones

The Municipal Polling Districts numbered 1, 2, 2A, 3, 4 and 12 are, for the purposes of this By-law, divided into the following zones, the extent and boundaries of which are shown on the attached Land Use By-law maps and in Appendix 2C. Such zones may be referred to by the appropriate symbols.

Zone	Symbol
...	
General Residential Single and Two Family	R-2
...	
Commercial General	C-1
...	

3.2 Land Use By-law Maps

Schedule "A" attached hereto, may be cited as the Land Use By-law Maps and is hereby declared to form part of this By-law.

3.3 Zones Not On Maps

The Land Use By-law Maps of this By-law may be amended to utilize any zone in this By-law, regardless of whether or not such zone has previously appeared on any Land Use By-law Map and Appendix 2C may be amended to reflect any amendments to the Land Use By-law map. Such amendments must be carried out in accordance with the Planning Act, and must be in conformance with the policies of the Integrated Planning Strategy.

...

21. Parking Requirements

For every building or structure to be erected or enlarged, off street parking located within the same zone as the use and having unobstructed access to a road or street shall be provided and maintained in conformity with the following schedule:

Type of Building	Parking Required
...	
C) Commercial	
...	
iii) Retail Stores and Offices	One (1) parking space for each two hundred (200) square feet of public access floor area.
iv) Shopping Centre	Five (5) parking spaces for every one thousand (1,000) square feet of public access business floor area exclusive of common malls between stores.
v) All other commercial uses excepting automobile service stations or public garages.	One (1) parking space for each two hundred and fifty (250) square feet of public access floor area.

...

23. Multiple Uses

Where any land or building is used for more than one purpose, all provisions of this By-law relating to each use shall be satisfied. Where there is conflict such as in the case of lot size or lot frontage, the higher or more stringent standard shall prevail, except where otherwise specified in this By-law.

...

PART 8: GENERAL PROVISIONS FOR RESIDENTIAL ZONES

1. Criteria For Business, Professional and Home Occupational Uses Permitted in Residential Zones

Not applicable in this particular case.

...

PART 14: COMMERCIAL GENERAL (C-1) ZONE

C-1 USES PERMITTED

1. No development permit shall be issued in the Commercial General (C-1) Zone except for one or more of the following uses:

a) Existing Residential and Existing Special Use Land Uses;

b) Retail Trade Establishments...

c) Finance, Insurance and Real Estate Establishments;

d) Business Services Establishments including accounting, lawyer and notary services...

e) Private Instruction services including driving schools, language schools, dance schools, etc....

f) Non-Institutional Health and Social Services, including; ambulance services, private medical health clinics, private practice offices of physicians and surgeons, specialists, dentists and other health practitioners; not commercial day-care centers or pre-schools.

g) Accommodation, Food and Beverage Services Establishments...

h) Amusement and Recreation Services;...

i) Personal and Household Services;...

j) Other Services Establishments;...

...

9. DEVELOPMENT AGREEMENTS

Large scale commercial buildings in excess of 15,000 square feet floor area shall be subject to development agreement.

Rajendram v. City of Halifax

PLANNING--CONTRACT ZONING--REFUSAL TO APPROVE A DEVELOPMENT AGREEMENT TO PERMIT CONVERSION OF DUPLEX TO 8-UNIT APARTMENT BUILDING--WHETHER REASONABLY CONSISTENT WITH INTENT OF M.P.S.--"NEIGHBOURHOOD" TO WHICH POLICIES APPLY--PLANNING ACT, S. 72(5)--CITY OF HALIFAX M.P.S., POLICIES 1.2, 1.4, 1.4.1

This is an appeal by S.R. from a decision of Halifax City Council refusing to approve a contract development to add to and convert an existing duplex on the corner of Windsor and Young Streets into an 8-unit apartment building. This property is zoned R-3 (multiple use) and is included in the City's Municipal Planning Strategy (M.P.S.). To the west along Young St. is a residential area zoned R-2 and to the south along Windsor is a home and then a 23-unit condominium apartment building. Two of the other corners of Windsor and Young Streets have used car lots and the remaining corner is National Defence property. The property is in an area designated Commercial on the Generalized Future Land Use Map of the M.P.S. It does not have sufficient square footage or rear yard to permit as-of-right development.

HELD: The decision of Council is confirmed.

The real issue in this appeal is the appropriate "neighbourhood" to which Policies 1.2, 1.4 and 1.4.1 of the Residential Environment Section of the M.P.S. apply. In determining whether the decision is reasonably consistent with the M.P.S., the Board must determine what is the neighbourhood to be considered when applying the policies. Given that the main entrance for the additional 6 units is on Young St., the neighbourhood that is being impacted includes the residences on Young St. The Board has also taken a view of the property and surrounding area. Council's decision is consistent with Policy 1.2 as it maintains the integrity of the existing residential neighbourhood in the Young St. area and with Policy 1.4 as the proposal is not really compatible with the single family and duplex units along Young St. Council's decision does not conflict with Policy 1.4.1.

NSMB-580-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, c.9 as amended;

- and -

IN THE MATTER OF: An Appeal by **STEVE RAJENDRAM** from a decision of Halifax City Council made April 30, 1987 refusing to enter into a development agreement to permit the addition to and conversion of an existing duplex at 3040 Windsor Street to an 8 unit apartment building.

BEFORE: LINDA D. GARBER, Vice-Chairman

COUNSEL: ROSS STINSON, LL.B., for the Appellant Steve Rajendram,

MARY ELLEN DONOVAN, LL.B., for the City of Halifax.

DECISION

This is an appeal from a decision of Halifax City Council made on April 30, 1987 which refused an application for contract development to permit the addition to and conversion of an existing duplex at 3040 Windsor Street to an 8 unit apartment building. The appeal was heard on Wednesday, November 4, 1987.

The Notice of Appeal was served on the Board on May 20, 1987. An Amended Notice of Appeal was filed on May 28, 1987. Before the hearing commenced, Mr. Merchant, the owner/occupier of the property immediately adjacent to the subject property on Windsor Street, raised a concern that the Notice of Hearing was not served on him until the Thursday prior to the hearing. When asked if he was requesting an adjournment, Mr. Merchant said no but that he wanted the Board to be aware of this and the fact that he was not able to contact all the residents in the area as a result. There were no other preliminary objections. The Board assumed jurisdiction and the hearing proceeded.

There were 4 witnesses. The Appellant testified, as did his neighbor Mr. Merchant. Mr. Robert Robertson, a Planner with the City of Halifax who works in the Policy and Development Division dealing with development agreements was called by the Appellant. Mr. John Heseltine, who is also a Planner with the City of Halifax and who is responsible for the Peninsula North area, was called by the City.

The Appellant purchased the subject property with the intention of developing more rental units. The property is located on the southwest corner of Windsor and Young Streets. Running west from the property along Young Street is a residential area, zoned R-2, which is comprised of single family and duplex units with one exception. Running south on Windsor Street, immediately adjacent, is Mr. Merchant's home and next to that on the corner of Cork and Windsor Streets is a 23 unit condominium apartment building. Used car lots are located on two of the other corners of Windsor and Young Streets and on the third is Department of National Defence property.

The subject property is located in an area described as Schedule "C" to the Land Use Bylaw (Exhibit R-7). It is an area that has been designated as "soft", requiring a detailed area plan. At present the area is designated Commercial on the Generalized Future Land Use Map and is zoned R-3, multiple dwelling. It was agreed that in the current draft of the Detailed Area Plan, (Peninsula North Secondary Planning Strategy) the subject property is zoned R-2 but the current draft has not yet been forwarded to Council and there is no indication as to when, or if, it will be. The subject property is on the north west boundary of Schedule C". The adjacent properties on Young Street are outside Schedule "C" and are designated under the M.P.S. (Exhibit R-1) as being part of a stable neighbourhood.

Although the subject property is at present zoned R-3, it does not have sufficient square footage or rear yard to permit an as-of-right development of the size which the Appellant wishes to build. The M.P.S. permits contract development in the Schedule "C" area. Under the M.P.S., an addition to an existing building is permitted only in the rear yard. In this case this would result in a rear yard of 13 feet rather than the minimum 20 feet for an as-of-right R-3 development or the average 35 feet rear yards on the properties along Young Street. The proposed 13 foot rear yard will be, in fact, a paved driveway with a parking space.

It was agreed by both planners that the relevant policies in the M.P.S. are the following three policies under the Residential Environment Section:

> "Policy 1.2 (now 2.2)
>
> The integrity of existing residential neighbourhoods shall be maintained by requiring that any new

> development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."
>
> "Policy 1.4 (now 2.4)
>
> Because the differences between residential areas contribute to the richness of Halifax as a city, and because different neighbourhoods exhibit different characteristics through such things as their location, scale, and housing age and type, and in order to promote neighbourhood stability and to ensure different types of residential areas and a variety of choices for its citizens, the City encourages the retention of the existing residential character of predominantly stable neighbourhoods, and will seek to ensure that any change it can control will be compatible with these neighbourhoods."
>
> "Policy 1.4.1 (now 2.4.1)
>
> Stability will be maintained by preserving the scale of the neighbourhood, routing future principal streets around rather than through them, and allowing commercial expansion within definite confines which will not conflict with the character or stability of the neighbourhood, and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

The real issue in this appeal is what is the appropriate "neighbourhood" to which the policies apply. Mr. Stinson has pointed out that the M.P.S. does not define neighbourhood. Policy 1.5.1 (now 2.5.1) provides that in the process of detailed area planning,

> "....residents shall be encouraged to determine what they consider to be their neighbourhoods, and to work with City Council and staff in arriving at an acceptable definition of their neighbourhood and a neighbourhood plan."

In this case the detailed area plan has not been completed and so the "neighbourhood" has not been determined.

Mr. Robertson defined the neighbourhood as including the commercial and institutional uses that front on Windsor Street. As a result the Staff report to Council which he prepared and his testimony was to the effect that the proposed development did not conflict with the three policies cited above. He agreed on cross-examination that if the Council had considered the neighbourhood as the block bounded by Young, Windsor, Cork and Dublin Streets, then the three policies support the position taken by Council in refusing the application.

Mr. Heseltine stated that he disagreed with some aspects of the proposal although these comments were not included in the Staff Report which was signed by Richard Matthews as Acting City Manager. He also stated that he considered that the neighbourhood included the residential area and that area included in Schedule "C" was not considered a separate neighbourhood.

It was suggested by Mr. Stinson, Counsel for the Appellant, that because City Council did not hold a public hearing and only had the Staff Report before them, that it was not open to Council to take into account other factors or to describe the neighbourhood in a different manner than had Mr. Robertson. With respect, the Board cannot agree with this position. City Council is composed of elected officials who represent areas of the City and have knowledge of the neighbourhoods in which they are elected. The Planning Act does not require that council hold a public hearing before refusing to enter into a development agreement. The alderman for the area made the motion for refusal. The Board notes that the reasons cited in the motion are all matters which were identified in the Staff Report or are included in the plans which are attached to the Report.

In determining whether or not Council's decision is reasonably consistent with the intent of the Municipal Planning Strategy as required by Section 72(5) of the Planning Act, the Board must make some determination as to what is the neighbourhood that must be considered when applying the policies. While Mr. Robertson emphasized that the subject property fronted on Windsor Street and that the appropriate neighbourhood included the commercial and other uses on the opposite corners, Mr. Merchant, whose property also fronts on Windsor Street, stressed that he considered that he was part of the residential neighbourhood that is bounded by Young, Dublin and Cork Streets.

The plans of the proposed addition illustrate that the main entrance for the additional 6 units is on Young Street and not Windsor Street and that there is no access to the existing building from the new addition. Given this fact, the Board considers that the neighbourhood that is being impacted includes the residences that run along Young Street. The Board has taken a view of the subject property and surrounding area. While Windsor Street is an area of mixed uses, the subject property and the adjacent Merchant property are clearly residential. The subject property is a corner lot and it appears to the Board that it and the adjacent Merchant property are part and parcel of the neighbourhood that runs along Young Street.

The Board is of the view that Council's decision is consistent with Policy 1.2 as it does maintain the integrity of the existing residential neighbourhood. Council's decision is also consistent with Policy 1.4 in that the Young Street area is a stable residential area and while the height of the proposed addition does not exceed that of other properties, the proposal is not really compatible with the single family and duplex units which are located along Young Street. Aside from the 25 foot setback of the existing building, the rest of the lot will be covered by the addition. Council's decision does not conflict with Policy 1.4.1.

The Board finds that the decision of Council is reasonably consistent with the intent of the M.P.S. and confirms the decision.

An Order to this effect will be issued.

DATED at Halifax, Nova Scotia, this 12th day of November, A.D., 1987.

Linda Garber

LINDA GARBER
Vice-Chairman

MacIntyre et al. v. County of Cape Breton

PLANNING--ZONING AMENDMENT--CREATION OF I-B (M1-B) ZONE AND REZONING FROM RR6 AND A2 TO I-B (M1-B)--WHETHER AGGRIEVED PERSON--WHETHER INCONSISTENT WITH OR UNNECESSARY FOR PROTECTION OF BEST INTERESTS OF MUNICIPALITY--PLANNING ACT, SS. 38, 60(5), 63(2),(5),(6), 112

This is an appeal by four residents as aggrieved persons from a decision by the Council of the Municipality of the County of Cape Breton creating a new industrial zone (I-B (M1-B)) and rezoning the subject property from Rural Residential (RR6) and Agricultural (A2) to the new zone. The area is not covered by a Municipal Planning Strategy (MPS). The subject land consists of approx. 2.75 acres located on the Point Edward Highway, has 225 ft. road frontage and is 610 ft. deep. The first 300 ft. back is zoned RR6 and the remainder A2. The applicant applied to rezone the property to C6 with the intent that his well-drilling business be relocated to the new site, although he denied this intention at the hearing. The Planning Advisory Committee (PAC) requested a more restrictive zone, and the planner proposed a new industrial use zone limited to the storing and repairing of heavy equipment and all uses in the R-1 Zone. The PAC recommended the new zone and that this apply to the applicant's land. One motion to this effect was passed by Council.

HELD: The Board allows the appeal and reverses the decision of Council.

Three of the Appellants reside immediately adjacent to the subject property and the Board has no difficulty finding they are aggrieved persons and that the appeal has been properly initiated. The Board's power to reverse the decision of Council is restricted by s.63(6) to finding the decision "inconsistent with or unnecessary for the protection of the best interests of the municipality." In determining this, the Board considered a draft MPS that had gone through a Public Participation Program (PPP). During the PPP it became clear residents wished future commercial and industrial development to be limited to designated commercial/industrial sites, and the proposed MPS policies prohibit new local industrial uses outside three designated areas identified in the MPS. The proposed MPS is not the sole criterion, however, for determining the best interests of the municipality. The Board feels there is a reasonable concern with respect to informal or non-authorized expansion of the applicant's business. It is difficult to see how the applicant's concern for the comfort of his employees or the protection of his equipment can be said to be in the best interests of the municipality, at least without evidence that the business would cease. The spot rezoning here is inconsistent with the protection of the best interests of the Municipality. As in Sauveur, the rezoning to a new zone before the appeal period with respect to the creation of the new zone had expired is not proper procedure, but the Board has no power to declare the by-law invalid as a result.

FILE NO; NSMB-576-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, c.9, as amended;

- and -

IN THE MATTER OF: An Appeal by JOSEPH F. MACINTYRE, ROY E. LEWIS, RITA LEWIS, ELEANOR MACKINNON from a decision of the Council of the Municipality of the County of Cape Breton made March 17, 1986 which created a new zone 1-B(M1-B) and amended the Land Use By-law by amending an area in Point Edward from Rural Residential (RR6) and Agricultural (A2) to Industrial 1-B(M1-B) on the application of GEORGE RUDDERHAM.

BEFORE:	LINDA D. GARBER, LL.B., Vice-Chairman
COUNSEL:	WENDY WADDEN, LL.B., for the Appellants
	PATRICK MURRAY, LL.B., for the Applicant;
	DAVID MUISE, LL.B., for the County of Cape Breton

DECISION

The appeal was heard on Monday, October 26, 1987 in Council Chambers of the Municipality of the County of Cape Breton. There were no preliminary objections. The Board took a view of the subject property. Counsel filed post-hearing briefs, the last being received by the Board on November 17, 1987.

On March 21, 1987, Council's decision to amend the Land-Use By-law and rezone the subject property was advertised in the Cape Breton Post. The Notice of Appeal was filed with the

Board on April 3, 1987, within the time limit set out in Section 63(2) of the Planning Act.

Three of the Appellants reside immediately adjacent to the subject property which is located in District 8 of the Mnicipality. Mr. MacIntyre's home is located on the west side of the subject property. Miss Rita Lewis lives immediately adjacent to the subject property on the east side. Mr. Roy Lewis has a farm immediately to the rear of the subject property and Mr. MacIntyre's property. There was no evidence as to the location of the residence of Mrs. Eleanor MacKinnon, the fourth Appellant. The Board has no difficulty in finding that the first three Appellants are aggrieved persons pursuant to Section 63(1) of the Planning Act and that the appeal has been properly initiated.

Counsel for the Municipality filed two letters (Exhibits M-4 and M-5) which refer to a proposal that the Minister of Municipal Affairs, pursuant to Section 112 of the Planning Act, extend the operation of the Municipality's zoning by-law passed under a previous Planning Act from November 30, 1986 to November 30, 1987. The Minister did extend the operation and this was published in Volume 10, Number 24 of the Royal Gazette dated November 27, 1986. The Board finds that it has jurisdiction to hear the appeal.

The Municipality does not have an overall Municipal Planning Strategy, hereinafter referred to as "M.P.S.". A draft M.P.S. for District 8 of the Municipality and a draft Land-Use

By-law were introduced as Exhibits M-7 and M-8. There were both described as the Seventh Draft and dated June, 1987. While it was stated in the March 9, 1987 Minutes of the Planning Advisory Committee that "the draft Planning Strategy for Districts 8 & 9 [was] presently in Halifax", the evidence at the Appeal was that County Council had tabled the M.P.S. and Land-Use By-law awaiting the Board's decision in this appeal.

Where there is no M.P.S. and Council is operating pursuant to Section 112 of the Planning Act, Section 63(6) of the Planning Act applies on an appeal to the Municipal Board. This section places a restriction on the Board and reads as follows:

> "63(6) Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the municipality ."

There were six witnesses: Malcolm Gillis, a Planner with the Cape Breton Metro Planning Commission and Joseph MacIntyre testified on behalf of the Appellants; John Shaw, soon to be a neighbor of both the Appellants and the Applicant, Councillor Rod MacArthur, the Applicant, George Rudderham and his daughter Brenda White testified on behalf of the Applicant. There were no witnesses called by the Municipality.

The Applicant lives along the Point Edward Highway in District 8 of the Municipality. He has operated a well-drilling business from the same location for over 40 years. In addition to his home he has a building on the property in which he has an office and stores some of the material used in his business. The well-drilling equipment and trucks used in the business are stored outside.

Less than a year ago he bought a lot of land, the subject of this appeal, located on the Point Edward Highway some 800 feet north of his property overlooking Sydney Harbour. The lot, according to the LRIS property mapping, has 225 feet of road frontage, is 610 feet deep and has an area of approximately 2.75 acres. The then existing structure, the Maple Leaf Club, has been removed. In January 1987, the Applicant approached the Development Officer of the Municipality to obtain a permit to build a storage garage on the subject property. He then learned that the subject property was zoned RR6 for the first 300 feet and the remainder was A2. A storage garage or warehouse is not a permitted use in either of these zones. The Applicant then met with Mr. Gillis and completed a zoning amendment application seeking a C6 zone.

Mr. Gillis prepared a report for the Municipality. In that report it is stated that the Applicant, George Rudderham, intends to relocate his business from its present location to the subject property. There is specific reference in the report to the storage of both equipment and materials and to conducting the business from the site. This report supports the evidence of Mr. MacIntyre that the Applicant had advised him in January, 1987 that he intended to move his business to the subject property. Mr. Rudderham denied this at the hearing. The Board finds that in January, 1987 the Applicant applied for the rezoning with the intent that his business be relocated to the new site. The Board also notes that the advertisements in the Cape Breton Post on February 21, 1987 and February 28, 1987 state that the purpose of the rezoning was "to permit the location of a well-drilling business on the site".

In his report, Mr. Gillis recommended rejection of the rezoning unless a new use and site specific zone was created. The Planning Advisory Committee met on February 2, 1987 and requested that Metro Planning devise a more restrictive zone and recommended that the application be advertised with the more restrictive zone. Mr. Gillis then drafted a proposed Land Use By-law amendment which created a new zone, Industrial 1-B(M1-B) Zone, which limited the industrial use to the storing and repairing of heavy equipment and all uses in the R-1 Zone. There were specific restrictions against outdoor storage and parking in the front yard. A minimum front yard requirement of 300 feet was also included.

In early March 1987, there was a public meeting called by some local residents. It was a stormy evening but some 30 people turned out. Mr. MacIntyre, one of the Appellants, was elected as Chairman. They discussed their concerns about the rezoning. Brenda White, the Applicant's daughter, attended the meeting. The Applicant was away in Florida when the various proceedings took place. Ms. White is Secretary/Treasurer of the company. She advised the people at the meeting that it was not the company's intention to relocate the business to the subject property but only to place a building there for storage and repair of equipment and trucks. The citizens formed a Committee and decided to circulate a petition to all residents of District 8 of the Municipality of the County of Cape Breton.

The Planning Advisory Committee met on March 9, 1987. Mr. Joseph MacIntyre spoke on behalf of the residents who were opposed to the rezoning and Mr. Guy LaFosse, Solicitor, appeared on behalf of the Rudderham family. The Minutes state that Metro Planning "recommends rejection of the application as it does not comply with the intent of the draft Municipal Planning Strategy for Districts 8 and 9 which is presently in Halifax". The Minutes further state that the Planning Advisory Committee was "assured that no business would be operated at this location, only the storage and repair of the two drillers during the winter months". The Planning Advisory Committee recommended that Council "amend the text of the Land-Use By-law to establish a new Industrial (M1-B) Zone and that this zone apply to Mr. Rudderham's land".

The matter came before County Council for final approval on March 17, 1987. The Minutes were subsequently amended at the April 14, 1978 meeting of County Council but in both cases reference is made to a rezoning "to permit the relocation of his well-drilling business". During the appeal hearing, there was reference to a Letter of Intention which was prepared by Mr. LaFosse and signed by Ms. White. This Letter of

Intention was alleged to have been given to Council, however, the letter was not introduced as an Exhibit since it could not be located. There is no reference in the Council's Minutes to any such letter. Although there was both a request to amend the text of the Land Use By-law to create the new 1-B(M1-B) Zone and a request to rezone the subject property, it appears from the Minutes that only one motion was put to Council. The wording of the motion, however, is not set out in the Minutes. The motion passed with only one Councillor opposed.

The Appellants raised as a ground of appeal that the Council erred in that it amended the map of the zoning by-law while the amendment to the text was under the time of appeal. In fact the Council made both amendments in one motion but the issue remains the same. The Board dealt with a similar situation in Sauveur et al and Town of Amherst NSMB-531-86-P, January 30, 1987. The Board reviewed Section 60(5) of the Planning Act and determined that an amendment to the Land-Use By-law creating a new zone is not in force until the appeal period has elapsed. The Board ruled that the proper procedure for Council to follow is:

> "to firstly pass the amendment to its Land-Use By-law creating a new 02-B-Zone and then after this amendment came "into force" following the expiration of the appeal period it could have then validly and effectively amended its Land-use By-law rezoning the Y.M.C.A. lands to the 02-B-Zone" (at Page 47 of the Decision).

The Board went on to find, however, that its powers on an appeal are limited by subsection (5) of Section 63. (In this case subsection (6) of Section 63 applies). The Board determined at page 48 that:

> "it has no power or authority to declare that a municipal by-law is legally invalid or is defective in some respect and must therefore assume the validity of the by-law in question."

The Board agrees with this conclusion.

As noted above, the Board's power to reverse the decision of Council is restricted by Section 63(6) of the Planning Act to finding that the Council's decision was "inconsistent with or unnecessary for the protection of the best interests of the Municipality". In determining what are the best interests of the municipality, the Board considered the Draft Municipal Planning Strategy for District 8. The Public Participation Program had been completed and the MPS and Land Use By-law were being drafted at the time that Mr. Rudderham made his application.

Mr. Muise, Solicitor for the Municipality, has argued that the Board should not consider the draft MPS because it is not law. In Lohnes v. Kings Co. (1976) 6 P.A.D. 643, the Provincial Planning Appeal Board took into consideration the proposed Municipal Development Plan in deciding whether or not Council's refusal to spot rezone was inconsistent with and unnecessary for the protection of the best interests of the municipality. The Board is of the opinion that it is appropriate in this appeal to take into consideration the proposed M.P.S.

During the Public Participation Program it became clear that the residents of District 8 wished to ensure that any future commercial or industrial development be limited to designated Commercial/Industrial sites. The MPS identifies three industrial sites: the existing Sydport Industrial Park; a proposed regional industrial park on a site between Keltic Drive and the Rudderham Road; and a portion of land along the northern side of Keltic Drive which runs into District 9. The first two sites are not too distant from the site of Mr. Rudderham's existing property. The MPS policies prohibit the establishment of any new local industrial use in District 8 outside the three designated industrial areas noted above. Existing industrial uses are classified as either non-conforming or a permitted use but subject to Section 38(2)(p) of the Planning Act with respect to expansion, alteration or change of use. Mr. Rudderham's existing business is listed as one of the latter on Page 26 of the MPS and page 40 of the Land-use By-law.

It is stated in Mr. Gillis' report that the Staff of Metro Planning is "not convinced the rezoning to Commercial C6 would be in the best interests of the neighbourhood nor does it comply with the intentions of the proposed Plan". The proposed alternative of a new 1-B(M1-B) Zone also does not comply with the intention of the proposed MPS. There is no such zone contemplated in the MPS and the stated policy is not to permit new industrial uses except in the three designated areas.

The proposed MPS is not the sole criterion for determining the best interests of the Municipality. It was stated by several witnesses that the best use of the subject property was agricultural since the soil was very good as compared to other parts of Cape Breton. There are farms in the area and the property immediately behind the subject property, owned by one of the Appellants, Roy Lewis, is a farm. It was recognized, however, that a 2.75 acre site is not large enough for a viable agricultural undertaking.

Councillor MacArthur in his testimony stated that since Mr. Rudderham had been in business in the area for 40 years and hired local people, he should be able to put up a building to protect the expensive equipment which he uses in his business. He considered this to be in the best interests of the Municipality.

Mr. Gillis expressed the view that monetary interests must be considered but pointed out that existing uses represent an investment already made. Mr. Gillis further testified that the area along the Point Edward Highway was one of the "safest bets" for building a home because it was isolated and not a good location for commercial uses other than neighbourhood commercial. The area is at present a mixture of residential and agricultural uses with only a few commercial/industrial sites. The subject property is an attractive site with a view of the harbour. The evidence indicates that there are very few residential sites available in the area.

The concern of the residents of the immediate area and others in District 8 appears to be not just that Mr. Rudderham is being permitted to build a storage garage but that he may subsequently attempt to expand his use of the property either formally or informally and that others may use this case as a precedent to seek rezoning of their property for commercial or industrial use. With respect to the issue of informal or non-authorized expansion, Mr. MacIntyre stated that he didn't wish to be placed in the position of having to monitor Mr. Rudderham's activities and to have to enforce compliance with the requirements of the new zone.

The Board feels that this is a reasonable concern. When questioned about his intentions, Mr. Rudderham seemed unclear about the requirements of the new zone. When he was asked about repairing the boom on his drilling equipment when fully extended, he indicated that if he had to he would move it back to his old location but the impression given was that he thought he could repair it outside on the subject property although this is specifically prohibited in the Industrial 1-B(M1-B) Zone.

Mr. Rudderham stated that his main reason for building the warehouse was to give his men a warm place to work while they did repair work during the winter months when drilling could not be done. A secondary reason was to protect his equipment. While he has had the business for 40 years, there have only been two winters during which he rented storage space at Sydport. He testified that he had asked whether he could rent space at Sydport and was informed that no space was available. His testimony also indicated that he did not inquire as to whether or not he could build at Sydport nor did he look at other locations.

It is difficult to see how the comfort of his employees or the protection of his equipment can be said to be in the best interests of the Municipality unless there was evidence that the business would cease if the rezoning was not granted. No such evidence was presented. In Calnen v. City of Halifax (1977), 7 P.A.D. 739, the Planning Appeal Board noted that "amendments to the zoning by-law of a spot rezoning nature, such as this case, should not be approved unless a need for change is clearly indicated by the Appellant".

Reference was made by all three counsel to Power v. County of Cape Breton (1986), 5-B M.B.D. 478. The Board has reviewed this decision and is of the view that the factors which led to the decision in the Power case are not present in this case. As a result, the Board does not accept that the decision of Council is a "strong indication of what is in the best interests of the Municipality" (Power, page 488) in this case.

It is the Board's opinion that the spot rezoning of the subject property to permit the storage of heavy equipment for three months of the year is inconsistent with the protection of the best interests of the Municipality. The Board allows the appeal and reverses the decision of Council amending the Land Use By-law and rezoning the subject property.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of November, 1987.

Linda Garber
LINDA GARBER
Vice-Chairman

Frank v. District of East Hants

PLANNING--ZONING AMENDMENT--APPROVAL OF REZONING FROM ENVIRONMENTAL OPEN SPACE FLOODPLAIN LOW POTENTIAL TO C1--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--WHETHER SHOPPING CENTRE--PLANNING ACT, S. 63(5)--DISTRICT OF EAST HANTS: CORRIDOR DISTRICTS AND MOUNT UNIACKE DISTRICT INTEGRATED P.S., POLICIES 6-4, 6-5, 9-1

This is an appeal by D.F. and D.F. from a decision of the Council of the Municipality of the District of East Hants rezoning 2.48 acres of vacant land on the south side of Highway No. 2 at Elmsdale from Environmental Open Space Floodplain Low Potential (01) Zone to Commercial General (C1) Zone. The Appellants' home is 5 lots from the subject property. A Municipal Planning Strategy (MPS) covers the subject property, under which the Generalized Future Land Use Map classifies it as in part Environmental Open Space Floodplain Low Potential (01) and in part Floodplain High Potential. The applicant proposes a strip mall with 9 rental units on the Floodplain Low Potential portion only.

HELD: The appeal is dismissed and Council's decision confirmed.

The Board's power to reverse the decision is restricted by s.63(5) of the Planning Act to situations where the decision of Council cannot reasonably be said to carry out the intent of the MPS. Policy 6-5 permits Floodplain Low Potential lands to be rezoned Commercial General if certain conditions have been satisfied. The specific requirements of concern to the Board are the minimum setback of 100 ft. from the margin of the water course, the maximum lot coverage and the criteria of Policy 9-1. The applicant can obtain the 100 ft. setback by adjusting the plot plan, and another water flow that drains onto the subject property is not a water course. On the lot coverage question, the Board finds that the parking requirements must be included in the calculations and that when this is done the coverage is slightly over the 30% maximum, but is less than 31%. The condition is satisfied. The relevant criteria in Policy 9-1 relate to environmental concerns and traffic generation. After consultation with the Dept. of Environment the Planner was satisfied environmental concerns had been met. With respect to traffic generation, the Dept. of Transportation had been consulted and the matter considered by Council. The Board also raised whether the applicant's proposal was a shopping centre. A Commercial Shopping Centre (C4) Zone is not permitted on lands designated Floodplain Low Potential. There is some overlap between the C1 and C4 zones and the present proposal does fit within the C1 Zone. While the Board is sympathetic to the position of residents in the area adjacent to the subject property, the MPS does contemplate the present rezoning.

NSMB-585-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, c.9, as amended;

- and -

IN THE MATTER OF: An Appeal by DAVID and DORIS FRANK from a decision of the Council of the Municipality of the District of East Hants made the 9th day of June, 1987 which amended the Land-use By-law by rezoning the land-use designation of certain lands at Elmsdale from Environmental Open Space: Floodplain Low Potential (01) Zone to Commercial General (Cl) Zone on the application of LAWRENCE JESSOME.

BEFORE: LINDA D. GARBER, Vice-Chairman

COUNSEL: DAVID FRANK, on behalf of the Appellants

ROBERT CARRUTHERS, LL.B., for the Municipality

DECISION

A hearing was held by the Board on November 23, 1987 in the Council Chambers of the Municipality of the District of East Hants on an appeal by Doris and David Frank from a decision of the Council of the Municipality made June 9, 1987, which approved an application by Lawrence R. Jessome to amend the Municipality's Land-use By-law by rezoning the applicant's land, located on Trunk Highway No. 2 from Environmental Open Space, Floodplain Low Potential (01) Zone to Commercial General (Cl) Zone.

The Notice of Appeal is dated June 29, 1987 and was received by the Board on June 30, 1987. The stated grounds of the Appeal are:

> "(1) The Council's decision does not reasonably carry out the intent of

> the Municipality of the District of East Hants planning strategy for the corridor area and Mount Uniacke."
>
> (2) Section 71, Chapter 9, Planning Act declare ourselves as aggrieved persons."

There were no preliminary objections and the Board assumed jurisdiction to hear the appeal on its merits.

The subject property is owned by the Applicant and is vacant land located in Elmsdale on the south side of Trunk Highway, No. 2. The total lot is 2.48 acres in size and is bounded by the CNR rail line to the south, undeveloped lands to the east and an approved vacant lot on the west for which a development permit for Local Commercial has been issued. Further to the west on both sides of Highway No. 2 are residential properties with one exception, a Farmer's Market. Immediately opposite the subject property is the Elmsdale Lumber Mill. The Appellants' home is located on the south side of Highway No. 2 and there are 5 lots between the Appellants' property and the subject property.

Elmsdale is located within the area covered by The Corridor Districts and Mount Uniacke District Integrated Planning Strategy of the Municipality of East Hants (hereinafter referred to as the "Planning Strategy") which was approved in 1985. Pursuant to the Planning Strategy, the Land-use By-law and the Generalized Future Land Use Maps (hereinafter referred to as "Gen.FLUM") the subject property is zoned in part Environmental

Open Space Floodplain Low Potential (01) Zone and in part Floodplain High Potential. It is the Applicant's intent to develop only a portion of the land, that portion being within the Floodplain Low Potential (01) Zone. The proposal is for what the Applicant describes as a "Strip" Mall with 9 rental units, each 600 sq. feet, with parking for 42 cars.

There were five witnesses who testified on the appeal: David Frank for the Appellants; Brad Hodgins, the Planning Co-ordinator, was called by the Municipality; Greg Hubley and Russ Andrews, local residents and Curtis Clarke, the County Councillor for the area, spoke against the rezoning. A letter dated November 20, 1987 addressed to the Board from S.C. Brewer, President of the Elmsdale and District Ratepayers Association was presented by Mr. Frank. The letter was opposed to the rezoning.

The concerns of the Appellants and the others who were opposed to the rezoning can be summarized as follows:

(1) commercial uses should not be permitted in residential areas because of the increase in traffic and noise, the increase in vandalism and the devaluation of existing residential properties;

(2) the subject property is subject to flooding and the proposed development will tend to increase the flooding which will impact on the neighbouring residential properties;

(3) there are areas which have been zoned commercial and should be developed first;

(4) the intent of the Planning Strategy was to prevent leap frog

development and the "Sackvillization" along Highway No. 2 in Elmsdale:

(5) the Applicant does not live in the community and therefore his home is not affected by the proposal.

In an appeal from a decision of Council amending the Land-Use By-law, the Board's power to reverse the decision is restricted by Section 63(5) of the Planning Act which reads as follows:

> "63(5) The Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the municipal planning strategy".

In making its decision the Board must consider the relevant policies of the Planning Strategy and the Land-Use By-law. The main policies which are applicable in this appeal are contained in Section 6 of the Planning Strategy which deals with the Environmental Open Space: Floodplain Low Potential (01) Zone.

In 1981 a study conducted on behalf of the Municipality identified the lands which were subject to high frequency flooding and those subject to low frequency flooding. The conclusions of this study are included in the Planning Strategy.As has been noted above, the subject property is zoned Floodplain Low Potential in most of the area where the proposed development is to take place. The balance of the property is zoned Floodplain High Potential. The Board notes that Mr. Frank suggested that the area has been improperly designated Floodplain Low Potential. There was no evidence adduced to prove this other than Mr. Frank's testimony as to what he has observed of the subject property. The Board is of the view that it is bound by the designations set out on the Generalized Future Land Use Maps.

Mr. Frank and the others who testified in opposition to the rezoning expressed the view that the subject property was zoned for residential use and that commercial use was not permitted. While Policy 6-4 of the Planning Strategy appears to restrict the use of Environmental Open Space: Floodplain Low Potential (01) Zone areas to Restricted and General Residential, Special Uses and Commercial Local land uses, Policy 6-5 specifically permits rezonings for Commercial General provided certain conditions are met. Policy 6-5 states in part as follows:

> "It shall be the intention of Council to permit rezonings for Commercial General within the Gen. FLUM designation Environmental Open Space: "Floodplain Low Potential" provided the conditions of P6-4 are satisfied...."

The first question for the Board is whether or not the various conditions have been satisfied. Mr. Hodgins testified that some conditions had been met and that he was assured by the Applicant's consultant that the others could be met. Mr. Hodgins assured the Board a development permit would not be issued unless all the requirements were satisfied.

The specific requirements which are of concern to the Board are:

> (a) a minimum setback of 100 feet between any proposed building and the nearest margin of the water course under normal flow

conditions;

(b) maximum lot coverage as defined in the Land-Use By-law not to exceed 30 percent;

(c) all applicable criteria of Policy 9-1.

Mr. Hodgins testified that on the plot plan which was filed by the Applicant and is contained in Exhibit F-1 there is not a 100 foot setback from the stream which runs from the Elmsdale Lumber Mill under the highway and across the subject property. He testified that in discussions with the Applicant's consultant he has been assured that this minimum setback can be obtained. Mr. Frank raised concern that there is also water which flows from a marshy area on the north side of Route No. 2 opposite Mr. Frank's property, across the back of his property and drains onto the subject property. There is no definition of a "water course" in the Planning Strategy or the Land-Use By-law. The Compact Edition of the Oxford English Dictionary defines "watercourse" as "a stream of water; a river or brook". An obsolete definition is "the flow of water". The Board adopts the former definition and finds that, on the evidence presented, there is not a second water course but there is water draining on the subject property.

Under the Planning Strategy and Land-use By-law lot coverage varies according to the zone. With respect to the Environmental Open Space (01) Zone, the parking requirements are to be included in the calculation of Maximum Lot Coverage. There was discussion at the hearing as to whether, on a rezoning from Environmental Open Space (01) Zone to Commercial General, the parking requirements must be included. The Board finds that it is mandatory that the parking requirements be included in the calculations of Maximum Lot Coverage on land that is rezoned from Environmental Open Space (01) Zone. The Planner has made the calculations based on that part of the subject property which is to be developed and found that by including the parking requirements the Maximum lot coverage is slightly over 30 percent but less than 31 percent. The Board finds that the condition has been satisfied.

With respect to Policy 9-1 which sets out the overall Rezoning Amendment Criteria which Council must consider, the Board considers the following relevant to this rezoning:

> "P9-1(b)(vi) the potential for the contamination of watercourses or the creation of erosion or sedimentation;
>
> (c)(iv) traffic generation, access to and egress from the site, and parking;
>
> (d) suitability of the proposed site in terms of the environmental features of the site, particularly susceptibility to flooding and other nuisance factors and where applicable comments from the Department of Environment concerning the suitability of the site for development."

In order to determine the impact of the proposed rezoning on the environment and satisfy criteria (b)(vi) and (d), Mr. Hodgins wrote to the Department of Environment. The material which was enclosed with this letter was not included in Exhibit F-1. The Board notes that the reply from the Director, Environmental Assessment, Department of Environment refers to that "lands....as having some flood potential" and that the Department's assessment was based on the information supplied. It is stated that "the proposal is not likely to have adverse effects on other lands" and that the "land proposed for development is likely to be flooded under extreme conditions". The Department recommends compliance with the elevations which are contained in Policy 9-4. Initially Mr. Hodgins was not satisfied that the environmental concerns had been met, however in an addendum to his report to Council he stated that the "application is now in conformance with the Planning Strategy and Land-Use By-law" and recommended approval. He noted that the Applicant has undertaken to contact the Department of Environment to reduce sedimentation impacts during construction activity.

With respect to traffic generation, access and egress from the site and parking, the Planner contacted the Department of Transportation. The Department of Transportation was satisfied that the Stopping Sight Distance for the proposed entrance was adequate but made no other comments. The staff report notes that the proposal meets the Land-Use By-law requirements but does not specifically comment on the parking requirements or traffic generation. The Board has reviewed the Land-Use By-law and is satisfied that the parking requirement has been met. With respect to traffic generation, while the Staff Report does not address this matter, it was raised by Mr. Frank and others at the meeting of Council on June 9, 1987 and the Board concludes that it was considered by Council.

During the hearing, the Board raised a question as to whether or not the Applicant's proposal was a shopping centre. The Commercial Shopping Centre (C4) Zone is not permitted on lands designated Environmental Open Space: Floodplain Low Potential (01) Zone. Shopping Centre is defined in Part 2 of the Land-Use By-law as follows:

> "81. Shopping Centre means a separate use of land containing a building or building complex on a lot designed, developed and managed as a unit by a single owner or tenant, or a group of owners or tenants containing an inter-related group of commercial uses; distinguished from a business area comprising unrelated individual uses and characterized by the sharing of common parking areas and driveways."

Mr. Hodgins stated that he had raised the issue with the Applicant during the early stages and that he concluded that the proposal was not a shopping centre. He explained that there was some overlapping between what is permitted in the Commercial General (C1) Zone and the Commercial Shopping Centre (C4) Zone. The Planner stated that he felt that this proposal was meant for small business retail and/or professional offices and that they would not necessarily be of a similar business use. Given that the units were only 600 square feet it was his opinion that this was not a shopping centre. The Board has reviewed the requirements of the C1 and C4 Zones. The C1 Zone has a minimum lot area requirement of 7,500 square feet and a maximum floor area of 15,000 square feet. The C4 Zone has a minimum lot area of 2 acres and where the floor area exceeds 35,000 square feet, a development agreement must be entered into. The Board agrees with the Planner that there is some overlapping between the two zones and is satisfied that the proposal does fit within the Cl Zone.

As noted earlier in the decision, the Appellants and the others opposed to the rezoning had five areas of concern. The first two have already been discussed. Dealing with the remaining three the Board has the following comments:

(3) Development of Commercial areas first - The Planning Strategy does not require that the areas marked as Commercial on the Gen. FLUM for Elmsdale be developed first. Policy P6-5 states that it is "the intention of Council to permit rezonings for Commercial General within the Gen.FLUM designation Environmental Open Space: Floodplain Low Potential".

(4) Prevent leap frog development - The Board does not believe that the rezoning of the subject property can be considered as leap frog given that it is immediately opposite the Elmsdale Lumber Mill.

(5) The Applicant is not a resident. This is not a criterion which the Board can take into account.

While the Board is sympathetic to the position of Mr. & Mrs. Frank and others who live in the residential area which is adjacent to the Applicant's property, the Planning Strategy does contemplate the type of rezoning for which the Applicant applied.

For the above reasons, the Board has determined that the decision of Council reasonably carries out the intent of the

Planning Strategy. The Board is concerned however, that the full impact of the water flow which Mr. Frank described may not have been taken into account by the Department of Environment. While the Board is not prepared to grant the appeal, the Board does recommend that prior to issuing the development permit, staff should determine the status of the water flow onto the subject property from the marsh lands opposite the Appellant's property and should contact the Department of Environment to ensure that all relevant information has been considered.

An Order confirming the Council's decision will be issued.

DATED at HALIFAX, N.S., this 8th day of December, A.D., 1987.

Linda Garber
LINDA GARBER
Vice-Chairman

Maritime Residence Estates Ltd. v. Town of Truro

PLANNING--CONTRACT ZONING--REFUSAL TO APPROVE A DEVELOPMENT AGREEMENT TO PERMIT 12-UNIT CONDOMINIUM--WHETHER REASONABLY CONSISTENT WITH INTENT OF MPS--PLANNING ACT, S. 16(1), 72--TOWN OF TRURO MPS, INTRODUCTION, POLICIES 2.2.1, 2.3, P-204, P-208, P-211, P-301, P-313, P-314, P-318, P-503, P-504, P-505, P-506

This is an appeal by M.R.E. Ltd. from a decision of the Council of the Town of Truro refusing to authorize a development agreement to provide a 12-unit condominium complex on a 22,000 sq. ft. lot on Willow St. in Truro. The property is zoned R-8, which is a Residential/Mixed Use Zone, and is within the Town of Truro MPS. The Appellant proposes to demolish an existing building, construct a parking lot in the front and construct a 2-storey building with about 5,800 sq. ft. ground coverage. The Planning Advisory Committee recommended approval. The Town called no evidence.

HELD: The appeal is allowed and the matter referred back to Council pursuant to s.72(4) of the Planning Act.

The Board has uncontested expert opinion evidence that the proposed development fits within the intent of the MPS and that Council is entitled to approve it. The Board must assume therefore that this is correct. On the assumption then that the proposed scheme lies within the intent of the MPS, the question for the Board is whether the decision to refuse to enter into an agreement reasonably fits within the intent of the MPS. The opposition of people in the area is not a sufficient basis to refuse approval. The opposition of residents must be founded on factual concerns fitting under the MPS umbrella. The Council offered several reasons for refusing approval. One is compatibility with the area. However, a couple of apartment buildings on a scale similar to this proposal do exist near the subject property. They are low and set back so as not to particularly clash with the surrounding residential properties. The Board has some concern whether Town Council decided on the basis of incompatibility or on the basis of "popular" neighbourhood representation alone. On the second point, the matter of buffering, the Board accepts the planner's evidence that buffering is never perfect and what is proposed in this case is adequate. Council also made reference to the standards for R-3 developments, but it is wrong in law to apply R-3 requirements in these circumstances. Finally, on the question of whether this proposed development is large enough to qualify for a development agreement, the Board finds that it is. The Board therefore rejects the reasons stated by Council for turning down the proposed development agreement. The proposed development is permitted within the intent of the MPS and the Board will therefore interfere with the decision of Council.

NSMB-584-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF; The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal to the Nova Scotia Municipal Board by MARITIME RESIDENCE ESTATES LIMITED from a decision of the Truro Town Council refusing to enter into a Development Agreement with the Appellant.

BEFORE: RICHARD L. WELDON, Member

COUNSEL: DOUGLAS A. CALDWELL, Q.C., for the Appellant, Maritime Residence Estates Limited;

DAVID W. GRUCHY, Q.C., for the Town of Truro.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981 The Municipal Board Act, the Chairman assigned Board Member Richard L. Weldon to hear this Planning Appeal at the Board's November 9, 1987 sittings at the Colchester/East Hants Regional Library Auditorium, 754 Prince Street, Truro, N.S. Truro will hereinafter be referred to as the "Town".

There was a Notice of Appeal dated June 26, 1987. This Notice of Appeal was received by the Board on that date. The Board assigned the Vice-Chairman to peruse that Notice of Appeal to determine whether or not the Notice of Appeal complied with the Planning Act, S.N.S. 1983, Chapter 9, and the rules made thereunder as to form and content for a Notice of Appeal. Pursuant to that assignment, the Vice-Chairman wrote Frank J.

Powell then solicitor for the Appellant on June 29, 1987 stating that " I am of the opinion that the Notice of Appeal does not fully comply with the Board's rules and accordingly will allow two weeks for the filing of Amended Notice of Appeal".

By an Amended Notice of Appeal dated July 10, 1987 received by the Board on July 10, 1987, Douglas A. Caldwell, Q.C., on behalf of the same Appellant, Maritime Residence Estates Limited filed an Amended Notice of Appeal and a written undertaking to pay the costs of advertising the Notice of Hearing.

Both the Notice of Appeal and the Amended Notice of Appeal contained the following grounds of Appeal:

> "(a) the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy as outlined in the relevant Municipal Development Plan;
>
> (b) That the Appellant would suffer undue hardship;
>
> (c) Such other grounds as may appear."

The decision appealed from is a decision of the Town Council refusing to authorize the entering into of a development agreement between the Appellant, Maritime Residence Estates Limited and the Town for the purpose of providing a medium density housing development in the form of a 12 unit condominium complex on land located at 77 Willow Street, Truro which decision of the Town Council was made June 8, 1987.

The appeal seeks to have the Board reverse the decision of Town Council made on June 8, 1987 which refused the applicant's (now Appellant's) application to enter into a development agreement whereby the applicant would be permitted to build a 12-unit condominium complex at 77 Willow Street, Truro.

The appeal came on for hearing at 10:00 A.M. on November 9, 1987 at the auditorium of the Colchester/East Hants Library, 754 Prince Street, Truro pursuant to a Notice of Hearing dated October 9, 1987.

Service of the Notice of Appeal and notification of commencement of proceedings were all proven to the satisfaction of the Board. All counsel agreed that the Board had jurisdiction and thereupon the Board, having satisfied itself on this point, agreed to take jurisdiction.

The Planning Act in effect at the time the decision was made in June 1987 is as follows:

> "72(1) Where Council has refused to enter into an agreement after application has been made pursuant to Section 55 or 56, the applicant may appeal the refusal to the Board.
>
> (2) A decision of the Council pursuant to sub-section one shall provide the Applicant with the reasons for the decision."
>
> (3) an appeal pursuant to sub-section (1) shall be served on the Board within twenty-one days of the date of the decision of Council.
>
> (4) the Board shall not interfere with the decision of Council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy in which case the Board shall
>
> (a) refer the matter back to the Council and

> (b) to instruct the Council to hold a public hearing in accordance with Section 42, if this has not been carried out prior to the appeal being made by the applicant."

[There have been slight amendments made as of August 1, 1987 which do not seem to have much to do with this Appeal].

> (5) a determination of the Board pursuant to subsection 4 shall contain reasons for the determination.
>
> (6) if the Council and the applicant have not approved the terms of an agreement within ninety days of the date of the determination of the Board, or within ninety days of the procedures being completed pursuant to subsection (4), either the council or the applicant may apply to the Board for an order fixing the terms of the agreement.
>
> (7) In an application pursuant to subsection (6), the Board may make any decision the council could have made, except that no order shall be made which commits the council to make any expenditures with respect to the development to be permitted pursuant to this Section.
>
> (8) Where the council has approved the entering into of an agreement pursuant to this Section, the resolution may be appealed by the same person and in the same manner as for the approval of an agreement under Section 55 or 56, except that the matters determined by the Board pursuant to subsection (4) shall not be reconsidered on the appeal."

The Appellant in this case is the person who applied to have its lands included in the development agreement and thus it is the applicant within the meaning of the above section and has the status of Appellant.

The area sought to be made the object of a development agreement is located at 77 Willow Street in Truro and consists of about 22,000 square feet of land in a rough L-shape, the top of the "L" being the frontage on Willow Street and the thick part of the lot, in the foot of the "L" in the interior of the block back of the houses lined up along the street lines making up the outside boundaries of the block.

The lot is situate on the Willow Street side of a block in Truro made between Willow Street, Victoria Street, King Street and Duke Street. Presently situate on the lot lined up with the street line is an older two-story residence typical in this area tied in close to the sidewalk, close to the street line and in line with many other of the houses on the street. There are certain outbuildings as well on the lot and it is proposed that all these buildings be demolished and the new construction be made towards the rear of the lot. According to the plan of the proposed site contained in the document brochure submitted by the Appellant being (Exhibit M-19, Tab 19 of that Exhibit) the frontage of the lot on Willow Street is 60 feet. The depth from Willow Street on the north boundary of the lot is some 289.2 feet and is a straight line boundary. The widest dimension of the lot is 169.63 feet. The lot's dimensions on the south side are in jog form and are respectively running from the rear line to Willow Street 53.07 feet, 24.21 feet, 44.21 feet, 45 feet, 4 feet, 149 feet. Two of those distances, namely 24.21 feet and 4 feet actually lead away or are parallel to Willow Street thus the subject lot has an irregular south boundary. In general summary the lot is narrow in the front for the first 150 feet and there has a width of approximate 60 feet. From 150' back it widens. The new development is proposed to be put in this widened portion which is at least 150 feet or more from the street frontage. The existing buildings on most of the adjacent lots are located much closer to the street boundaries. The configuration of the various blocks may be easily seen on various colored area of photographs being Exhibit M-11, Photographs A, B and C. The subject land now consists of a Lot A and a Lot B. These two lots would have to be combined by a subdivision process to give effect to the development agreement.

Mr. Caldwell for the Appellant called Mr. Gunter Luttgen, Donald Mason, a Planner, and Vincent Robert, a Councillor of the Town. Mr. Gruchy called no evidence. Mr. Ernest Lowell Bradley, Mr. Craig Phillips, Mr. Orville Pulsifer gave evidence and representations on their own behalf. Mr. Caldwell called Mr. Mason in rebuttal.

After the evidentiary portion of the hearing, counsel made argument and then the Board, together with counsel took a view of the site. The Board adjourned the hearing before viewing the site and reserved its decision.

Mr. Gunter Luttgen, a principal of the Appellant, described the subject property. He noted that the property was located in Revitalization Area Two, shown on the Town of Truro Municipal Development Plan (MDP) future land-use map. He expressed the belief that the Municipal Planning Strategy (MPS) would allow the proposed development in the revitalization area despite the zoning of the area by development agreement only. The MPS, he says, permits a development of medium or high density residential uses together with some commercial uses by contract development. Mr. Luttgen said that the Appellant's proposal does not contemplate any commercial use. Mr. Luttgen said that the Appellant could have come in with a three story building with more units but he felt that a two story building as he had proposed with 12 units would be more compatible with the neighbourhood. Mr. Luttgen pointed out that he had an agreement of sale to purchase the subject lands subject to the approval of a development agreement by the Town of Truro and that the Appellant had gone to some considerable expense for the engineering and planning necessary to put the proposal before Council.

Mr. Luttgen said he had negotiated thoroughly on numerous occasions with both the town planner, Mr. Peter Nelson and with the Planning Advisory Committee (PAC) of the Town. He or his real estate agent had at least eight meetings with the PAC.

As a result of these meetings Mr. Luttgen received positive recommendations from Mr. Nelson to the PAC and to Council and positive recommendations from PAC to Town Council that the development agreement be entered into on certain appropriate terms and conditions.

Mr. Luttgen then described the locale of the revitalization area and identified multiple and commercial uses within the general area of the proposed development. There are many two-unit, four-unit houses close to the subject property. Mr. Luttgen said that Willow amd Victoria Streets are arterial streets in the Town. There is heavy traffic on both. Mr. Luttgen said that he had approached the land-owner to the south of him on Willow Street, one Mr. Drake but was unable to finish negotiations on the purchase of Mr. Drake's land. He felt that if the Appellant had purchased the Drake land it would had to build too massive an apartment building on the combined site to be compatible with the area. If it didn't build a more massive unit following the purchase of the extra land from Drake the Appellant could not make the development an economically sound proposition from the Appellant's point of view as a developer.

Mr. Luttgen said that the final proposal that he would put to Council in any final draft development agreement would be slightly different from the one shown on Exhibit M-8, Tab 19. The area shown as "transformer pad" would be turned into a buffered pad containing the garbage disposal. There would be a basement put in the building to hold workshop, storage, the electrical units, heating, etc. Mr. Luttgen further proposed that parking lots 5, 6, 7 and 8 be removed from the subject property's north line and be replaced with flower gardens, and that those removed parking lots be placed in various places on the south side of the lot thus giving the Bradley House some buffering from the effect of headlights of cars parking on the subject property.

As to buffering of the adjacent uses, Mr. Luttgen said that there would be fencing, gardening and the like as per the development agreement which is in a form attached to the Notice of Appeal. Mr. Luttgen said that it was his opinion that his proposal fell within the revitalization objectives of the MPS, that it was compatible with the neighbourhood, that the thrust of the MPS was to encourage this type of development and that this type of development would not be injurious to the values of the adjacent properties.

Mr. Donald Mason of Halifax submitted a detailed curriculum vita which shows that he has an extensive education and practice in urban and rural planning. By agreement of counsel, the Board was able to qualify Mr. Donald Mason as an Urban Planner entitled to give opinion evidence concerning planning matters as they affect the Town.

Mr. Mason gave considerable evidence. He stated that the proposal by the developer fits within the MPS of the Town, is consistent therewith and that the decision of Council refusing to enter the development agreement was inconsistent therewith.

Mr. Mason said he had visited the site and reviewed the documents and reports of Mr. Peter Nelson, the Planner of Truro and he concurred with the opinions expressed therein.

Mr. Mason filed a written report which may be found in Exhibit M-8, Tab 16.

Councillor Vincent Robert is a first term Town

Councillor. He is also a member of the PAC. He said the PAC in Truro consists of six people of whom four are Councillors. He said that at the PAC meeting, three of the Councillors (not the Chairman) had voted to recommend to Council the adoption of the development agreement as proposed by the Applicant.

Councillor Robert said that at the Council meeting following the public hearing the vote of the Council was different than what was reported in the minutes of the meeting. He said that he abstained from voting in favour of the resolution to reject the recommendation of the PAC. Councillor Robert thought that one other Councillor abstained and that there were present at the meeting six Councillors present plus the Mayor. One Councillor voted against the resolution. Therefore Councillor Robert thought the vote count reported in the Minutes should have been five to one with two abstentions instead of six to one. He said he didn't think the Mayor voted. Councillor Robert didn't believe that there was any duty on Councillors under the Town Council practice to vote at a Council meeting when present. The Councillor said that he was absent when minutes of the June meeting came up to be approved so that his abstention was not noted in any correction of the minutes.

Mr. Ernest Lowell Bradley gave evidence on his own behalf. He resides in the residence on the lot adjacent to the north boundary of the proposed land. His lot has a common boundary with the subject lot for the entire length. He objected to the development on the grounds he felt that the parking lot would not have sufficient clearance for parking of cars for the buffering and for turning of cars in the proposed development. He further objected that there was not sufficient buffering between his lot and the subject lot. Mr. Bradley said that the traffic problem and the turning on and off Willow Street would be very difficult for the number of cars envisaged for this proposed development. Mr. Bradley felt that his building was very insufficiently buffered from the effects of the proposed development.

Mr. Craig Phillips lives at 11 Victoria Street. He said that some of the houses listed by Mr. Gunter Luttgen as being a multiple-family use in the immediate area of the subject land were actually reverting back to single family use. He said that his understanding of the MPS with respect to revitalization was that the exteriors of the buildings would be kept and that such revitalization as occurred would be done within existing facades. Mr. Phillips said that the proposed building resembles no other building in the neighbourhood. He felt that the proposed development buildings as much too close to the lot lines of the adjacent properties. Mr. Phillips felt that the will of the people and the will of the Council should prevail.

Mr. Orville Pulsifer also spoke against the development. He spoke in the context of a neighbour who was near another larger development called Charter House which is a 50-unit condominium in Truro. He said although the construction of Charter House on balance is good for Truro, the height of the adjacent Charter House Building destroyed the privacy in his back yard and therefore in his style of living. Three of these witnesses filed their remarks in written form with the Board and all were given Exhibit Numbers. Mr. Bradley, M-16; Mr. Phillips, M-17 and Mr. Pulsifer, M-18.

The subject property is presently within an R-8 Zone under the Land-use By-law (LUB) of the Town (Exhibit M-19). At page 56 of that Land-Use By-law, R-8 is called a Residential/Mixed Use Zone and its special requirements are as follows:

> "No development permit shall be issued in an R-8 residential zone of converted dwellings of more than four dwelling units."

According to the permitted uses shown on Page 45 of the same document, an R-8 Zone permits single family detached dwellings with the usual requirements and converted dwellings with the special requirements and no other types of development. By the same token, an R-3 Zone allows with standard requirements, single family detached dwellings duplex, semi-detached dwelling, triplex apartment buildings and permits with special requirements, converted dwellings, row house dwellings, boarding houses, guest houses and day-care centres. The R-8 Zone is therefore seen to be much more restrictive than the R-3 Zone when the LUB is applied.

The Town has a MPS which is before the Board as Exhibit M-10. Schedule A to this decision contains many excerpts from the MPS and specifically those excerpts which were considered by the Board in dealing with this application.

Mr. Caldwell for the Appellant, adduced evidence which, if correct, tended to show that the development as proposed by the Appellant fitted within the intent of the MPS and was certainly permitted in this Revitalization II area in an R-8 zone.

His planning expert argued that the decision of the Council, in the expert's opinion, was contrary to the intent of the MPS.

Mr. Caldwell brought a lot of evidence tending to show that the neighbourhood was mostly a mixed neighbourhood with multiple residential uses being the majority of uses on the individual land holdings. He also pointed out that there were a lot of commercial uses in the proximate area.

Mr. Gruchy made no particular point that the proposal envisioned by the proposed development agreement was not within the intent of the MPS.

He called no evidence to show that it wasn't. On the other hand, Mr. Gruchy said that there was no onus on the Council to approve every scheme that fell within the intent of the MPS. He argued that the Town had the discretion to accept or refuse such schemes and he argued that although this discretion was not an unfettered one, but was within limitations, the reasons given by the Town to the developer were sufficient to show that the decision of Council was within the intent of the MPS.

Those reasons given by Council may be found in Exhibit

8, Tab 8 which is a letter to Mr. Ronald Creighton from D.G. Gilroy, the Town Clerk and reads as follows:

> " Following the Public Hearing on the proposed Development Agreement for 77 Willow Street held June 8th, 1987, I am writing to advise that Council has refused this application for the Development Agreement for the following reasons -
>
> (1) the project is incompatible with the type of development in the area;
>
> (2) there is not provision for adequate buffering in the area;
>
> (3) the usual tests for development of this sort are does it meet the R-3 zoning requirements and if not, then no development;
>
> (4) further land assembly is needed."

Mr. Mason testifying for the Appellants studied each one of these items one by one and rejected them in his opinion as not having any validity in fact. Mr. Caldwell argued that a previous Board decision concerning Truro, of Century 21 Market Realty v. Town of Truro 1985 Vol 4 (B) M.D.B. p.66 (dealing with the same section of the Planning Act) gave the test that the Board should apply and commented that the Board should follow the same test and arrive at the same result.

Century 21 is an appeal decided by three Board Members, decided in relation to the MPS in Truro, and decided in relation to a development agreement in the Area One Revitalization Area. The effect of the development agreement in Century 21 was to alter the interior of a Victorian Style building and to turn it into a real estate office with the top portion to residential and the back yard into a parking lot. The Board mentioned that

Counsel in the Century 21 case argued that this was not a large property. At Page 89 of the reported decision:

> "Finally, Mr. Curtis submitted that pursuant to Policy P-503 Council could only deal with "large scale" developments."

In a subsequent part of the decision the Board did not deal specifically with this "large scale" allegation but it did implicity decide against the "large scale" argument in the result of its findings. It is clear that the $850,000.00 proposed cost for the demolition and rebuilding in this case is a "larger scale" development than the development envisaged in Century 21 decision.

In Century 21 the Board had this to say:

> " The proposed development when implemented in accord with the draft development agreement will have the effect of assisting in the preservation of the Victorian architecture of the building on the subject site in accordance with M.P.S. ...."

Further on Page 94:

> "...Council in exercising its privilege of refusing to enter into a development agreement with the Appellant did so on the basis of "opposition from the area" which is certainly a relevant matter for Council's consideration but does not necessarily mean that the proposed development does not reasonably meet the intent of the M.P.S."

The development in this particular case envisages a construction of a parking lot to the front of the existing building, the demolition of the existing building and the location of a new structure having a ground coverage of about

5,800 square feet as near as the Board can scale from the diagrams put before it exclusive of any outbuildings or parking spaces. The proposed building is 2 stories high with a sloping roof on top of that. The developer has agreed to cut down the central hall by two feet, reduce the width of the building by two feet. This proposed change means the south boundary of the building will go north two feet thus increasing the sideyard on the south side of the building between it and the adjacent lot lines. Even so there is only 8 feet or so clearance on the south side from the nearest lot lines.

Mr. Donald Mason did not describe the proposed condominium as a large project. In the absence of the decision in Century 21 the Board would have thought that this project was not a "large project". If it were not a "large project" it would therefore not be suitable for development agreement proceedings within the intent of the M.P.S. Section P-503. If in Century 21 the development was "large" enough to qualify for inclusion in a development agreement than clearly the present proposal was large enough so that the preamble that was quoted in the Schedule "A", P-503, of the MPS apparently has no application in this appeal. The Board is prepared to follow Century 21 and say that this is a sufficiently "large scale" development to be dealt with by development agreement.

The Board is then left with the uncontested expert opinion of Mr. Mason citing that the proposed development does fit within the intent of the MPS and the Council is entitled to approve it. The Board must assume therefore that the proposed development falls within the intent of the MPS and it is permissable for the Town Council to enter into a development agreement with the developer Appellant on appropriate terms and conditions.

Mr. Gruchy argues that while this may be so Town Council has equal freedom or a discretion not to enter into a development agreement and has chosen to exercise that discretion in this case. Mr. Gruchy argues that many of the issues that the Town Council has to resolve in considering an application for a development agreement are matters of judgment on which honourable men can honestly differ but that having made honest choices among the alternatives and arrived at a judgment, that judgment should be entitled to stand without any interference from this Board. He cites the wording of Section 72(4) of the Planning Act "the Board shall not interfere... unless.....".

It seems then that the question before the Board is "Did the decision, (on the assumption that the proposed scheme lies within the intent of the MPS and therefore could be entered into) to refuse to enter into an agreement reasonably fit within the intent of the MPS?"

The Board will first look to the Council's expressed reasons and deal with them one by one.

> "(1) The project is incompatible with the type of development in the area;"

The planning evidence of Mr. Mason is that it is compatible. He seems to have been agreed with by Mr. Peter Nelson. People that disagree with him are the immediate neighbours of the proposed development who have disagreed with the proposal at hearings held by the Board and also as the Town Council level. The local inhabitants have the view that the proposed use is incompatible with the surrounding land uses. The buildings proposed are of a bulk three to four times the size, at least in number of living units, to any of the surrounding residential units on this side of Willow Street. The "architectural" renderings before the Board show a front elevation and a side elevation of a rather plain building apparently brick in construction, with a sloped roof and two storeys. Those residences in the immediate area are quite tall and "Victorian" in style. The parking lot reaching almost to the street will be a variation in the block in which the subject land is situate since most of the other properties on the block, all four sides, have their buildings close to the street line and have large empty backyards so that the block itself is rather in the form of a hollow square with the buildings making the wall of the square and the hollow inside being the un-built-upon back areas of the lots. This proposed parking lot to the fore and the building to the back will be a difference.

The application of the term "incompatible" to a development and areas as are found in this appeal is largely a matter of judgment. Certain tests of incompatibility often used by the Board measuring "incompatibility" have regard to the size and bulk of the proposed buildings, the relation of the proposed buildings to the street and how the exterior of the building would relate to existing neighbourhood buildings. Perhaps honest men could often differ on such matters of incompatibility.

The planners did not see any incompatibility. Only one member of the PAC (the Chairman) disagreed with the project and three other elected Council members on the PAC agreed with the scheme at the PAC stage. It would seem to the Board that the issue of incompatibility would be equally visible at the PAC level as it was at the Council level. In view of the fact that the planner in advance of the hearings and Mr. Mason, a planning expert second guessing the planner and Town Council afterwards in full hindsight, held a strong view that the proposed development was compatible with the area.

The only changes that are apparent to the Board between the decision made in Town Council and the previous decision made in the PAC is that there was public presentations made at the public hearing prior to Council's decision. Century 21 warns us that the opposition of the people in the area alone is not enough: that opposition must be founded on factual concerns fitting under the MPS umbrella. It is not sufficient if the "popular opposition" founds itself solely on the human tendency to resist change.

Mr. Mason in his testimony made a rather revealing comment when he referred to a couple of apartment buildings on a scale similar to the proposed development on a short-stub street near the same block as the subject property and shown on Exhibit M-11, Photograph A. He said that these apartment buildings were low enough and far enough back from the main road that they were nestled behind cover and out of sight of the casual passer by and therefore they did not have any clash with the surrounding residential uses. Aerial photographs of these apartment buildings are shown with the leaves still on in the Autumn in the adjacent block to the subject property. When the Board visited this particular site the leaves were off the trees yet these apartment units still did not particularly clash with the surrounding residential properties. They were very considerably set back from the building line along the arterial street frontage and their parking lots were also well set back. Having canvassed all these thoughts and all this evidence, the Board has some concern whether Town Council decided, as was stated, based on its judgment of the incompatibility of this project with the neighbourhood or whether it decided on the basis of "popular" neighbourhood representations alone. Given its present indecision on this point, the Board moves on to point number two.

> "(2) There is not provision for adequate buffering in the area."

Buffering, again, is a concept of reducing the friction between land uses of different types or degrees of intensity of development. Buffering, as a concept, is not the total isolation of conflicting land uses. A contract development here could have permitted, for example, commercial uses of various types such as restaurant uses as well as the residential use proposed. The subject proposal has the merit of being a solely residential development. It is not that far out of line at 12 units with other uses in the area which vary from single family use to four units per building. It's also in the same general area of a large condominium development which on the evidence before the Board has fit into Truro even though it has a minimum of 50 units and is of a greater height. Charter House is, apparently, larger than the proposed development yet fits into the Truro landscape.

The developer, given the restricted size of the subject lots, has made maximum effort to make full use of the distances of the presently existing houses from their lot lines next to the subject property to ensure the amount of distance between buildings be maximized, (both the proposed buildings and the existing buildings). Such distancing will provide some buffering effect. In addition it is proposed in the draft agreement that there be considerable buffering provided adjacent properties in the way of gardens, hedges and the like to be placed on the subject property.

Given the size and shape of the lot and given the possible permitted development under contract development, the location of the building on the lot provides some buffering for the existing buildings nearer the street on the north and south of the property facing on Willow Street. The parking lot itself provides some sort of buffer as well as some sort of conflict with the adjacent uses. The planner, Mr. Mason, is of the firm opinion that buffering is never perfect but, as proposed by the developer, it is good in these circumstances. Again, the PAC seemed to adopt to this proposed buffering as adequate while Town Council took the opposite view.

Again buffering is an issue on which honest men can differ honestly. Mr. Gruchy pointed out it is a matter of opinion what is and what is not adequate buffering. The Board in this particular case will accept the opinion of Mr. Mason that there is adequate buffering within the meaning of the MPS, therefore the factual reason that the Town Council gave for turning it down (that there was inadequate buffering) is not valid and the Board so finds.

There is a third reason for refusal stated by the Town which goes as follows:

> "(3) The usual test for developments of this sort are - does it meet the R-3 zoning requirements and if not then no development?"

The Board is unable to see from its reading of the MPS and the LUB why R-3 should even be discussed in this matter and since the subject land is zoned R-8. The Board however, has to accept that its reading may have led it to an incorrect conclusion. The Planner, Donald Mason, in evidence (agreed with by Mr. Gruchy in argument) said that the R-3 tests applied here by the PAC, Mr. Nelson and the Appellant provided a bench mark for the appropriate type of development to be contemplated in the present development agreement and thus the proposed development agreement should be construed in the context of a R-3 development with variations therefrom as required. Mr. Caldwell argued that this statement is legally incorrect in the sense that there is no existing requirement on the subject land to meet the R-3 zoning requirements. In any event, the Board does not accept that the R-3 zoning requirements are to be met because of course there can be in contemplation no deviations from those R-3 zoning requirements. Any deviations must be from R-8 zoning requirements.

If R-3 zoning requirements are to be accepted as the bench mark to serve as the basis for the contract development, (and the Board, on the evidence given, accepts them as such a bench mark for starting the negotiations towards a development agreement) then, in the opinion of the Board, it is wrong in law for Town Council to give as a reason for refusing the development agreement reason "3" quoted above. Town Council, to comply with the intent of the MPS, should have noted that it was deviating from the R-8 zoning by contract development and in so doing was going to use as the standard of control of land use the R-3 zoning requirements modified to fit present circumstances.

The fourth reason given by Council is:

> " Further land assembly is needed."

The Board would have thought in the absence of Century 21 decision that the "large requirement" mentioned in the preamble to Policy P-503 would definitely allow Council to insist that the development be made larger before they would agree to enter into a development agreement. In the Century 21 decision a scheme much smaller than the proposed development, in the same town under the same MPS was found to be large enough to qualify. This project therefore is certainly "large" enough to qualify. This Board will not deviate from that aspect of the Century 21 decision. Therefore the Board finds that the 4th given reason of Council "that further land assembly is necessary", is not a legally acceptable reason and is factually incorrect, since this present scheme is large enough to be subject to a development agreement and doesn't require more land. There is no specific size of land mentioned as a minimum size (or minimum dollar value set) for development agreement in a relevant portions of the MPS that deal with this type of application.

The Board has turned down the Town's 2, 3 and 4 reasons and now must deal solely with the balance of number one, dealing with the incompatibility of the proposed use with the surrounding uses. As noted above, the Board is somewhat uncertain whether what the Town Council calls "incompatibility" was correct within the intent of the MPS. Having considered and reconsidered, the Board comes on balance to the conclusion that the proposed development is sufficiently similar to the other apartment buildings on a stub street mentioned above that this proposal will be compatible with land uses in the adjacent areas in accordance with the opinion of Donald Mason which it has reviewed and accepts.

Thus the Board rejects the reasons stated by Council as being inadequate reasons on the facts in this case for Council to turn down the proposed development agreement. With those stated reasons of Town Council being either inaccurate in fact or wrong in law the only reason the Town Council appears to have for turning down this present proposal is the representations (not founded on factually proven violations of the intent of the of the MPS) of the citizens alone. As stated in the Century 21 decision this is not adequate.

The Board therefore is of the opinion that the proposed development is permitted within the intent of the MPS. It further determines that the decision of Town Council complained of cannot reasonably be said to be consistent with the intent of the MPS. Therefore the Board will interfere with the decision of Town Council and refer the matter back to Town Council in order for the Town Council and the Applicant/Appellant to approve and enter into a development agreement pursuant to subsection 4 of Section 72 of the Planning Act.

An Order will pursuant to Section 29 of the Municipal Board Act issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of December, A.D., 1987.

RICHARD L. WELDON
Member

SCHEDULE "A"

EXCERPTS FROM THE MPS - TOWN OF TRURO

INTRODUCTION

Page (ii)

The general goal of the Plan is to encourage orderly growth and development of the Town while ensuring a secure and pleasant environment for its citizens.

...

Page (iii)

The maps that are specifically referred to in Policy Statement also constitute a part of this plan. The maps and their official skills are Future Land Use Maps at the scale of one equals 6,000

.... All other maps including the above at different scales are for information purposes only. This Plan does make use of development agreements as provided for by Section [33(2)(b)] of the Planning Act. The general motive in using these agreements is to accommodate a specific use where the zoning for such a use would not be desirable or more succinctly, when it is not so much "what" but "how" a development occurs which determines its compatibility among other uses.

...

Page (iv)

...The Town prospered and grew over the years developing a comprehensive network of municipal services to facilitate a population today of approximately 13,000 and a commercial, industrial and social infrastructure for a population of approximately 45,000.

...

Page (v)

...Economics and changing life styles have evoked an exodus away from the established urban centre to the neighbouring rural fringe. This has been expressed in terms of a slowdown in construction activity and a decline in population within the Town during a period when such activities were prospering within the area.

...

Page (vi)

The socio-economic implications of urban living are becoming attractive and the Town must prepare for such an eventuality. ... The Town of Truro has many natural and jurisdictional constraints on available land within its boundaries. These constraints and the objectives of this Plan must be effectively dealt with to increase development opportunities for residential growth.

LAND USE POLICIES
Page 8 - Residential Land Use Designations

Indicated on the Future Land Use Map are two residential land use designations, low density and medium to high density.
....

Page 10
2.2.1 Medium to High Density Residential Areas
It is intended in this plan to encourage medium to high density residential uses, in and around the downtown area, to maximize the land use densities within these areas. This contemplates a mixture of residential activity from medium density uses such as triplexes, low rise apartments, town houses, etc. to high density activity such as high rise apartments. The intention here is the intermixing of two distinct land uses, medium and high density.

Therefore, it shall be the policy of Council to:
P-203(a) - Designate on the Future Land Use Map areas of medium to high density residential development.
...

Page 11
2.3 - Revitalization Areas I & II
The recently completed "Railway Relocation Study", among other things, was instrumental in pointing out the significance of Victorian architecture in downtown Truro. These areas have a high use potential and are well preserved, two often conflicting characteristics. The people of the Town of Truro have a great deal of pride associated with these areas as evidenced by the well preserved architecture. Solely residential use of these areas, with respect to architectural preservation has economic problems. Energy costs have put a great deal of pressure on the owner/developer to transform these structures into more energy efficient enclosures and more densely utilized spaces. The high cost of restoration and incorporation of modern energy efficient technologies may be expected only in the very rate cases.

Revitalization areas I and II are identified as being architecturally significant areas. Designating these areas for solely medium density residential uses is seen to be detrimental to this architectural heritage. It is intended here to limit the current uses so as to expand, in a controlled fashion, land uses possibilities for this area and at the same time preserve this heritage.

P-204(a) - Therefore, it shall be a policy of Council to:

Create a Residential Mixed Use Zone permitting single-family residential uses with limited conversion possibilities to a maximum of four (4) dwelling units in revitalization areas I & II.

Revitalization Area I - (See Future Land Use Map)

In addition to permitted uses (above), allow office,professional and medium to high density residential uses by Development Agreement only.

P-204(b) **Therefore, it shall be a policy of Council to: Consider (and may permit) office, professional and medium to high density residential uses of five or more dwelling units in revitalization area I as designated on the Future Land Use Map by Development Agreement only. In evaluating such an Agreement, in addition to criteria outlined in the Implementation part of this Plan, the Developer shall include, for Council's consideration, the following:**

detailed external architectural representations indicating architectural preservation and/or continuity to be maintained and shall include:

building plan(s) and details
building elevations
landscaping plan(s)

architectural representations may consist of photographs, drawings or similar graphic means.

Council may consult its own architectural advice should circumstances warrant such professional consideration.

Revitalization Area II - (See Future Land Use Map)

Revitalization II has been created to allow restaurants in areas adjacent to arterial streets as indicated on the Future Land Use Map, in addition to professional, office and medium to high density residential uses by Development Agreement only.

...

P-204(c) **Therefore, it shall be a policy of Council to: Consider (and may permit) in addition to Policy 204(b) above, restaurant uses in revitalization area II as designated on the Future Land Use Map and subject to the same criteria as Policy 204(b) above.**

...

P-208- Therefore, it shall be a policy of Council to: Encourage by the use of this plan and whatever other means possible, residential development to occur within the Town.

...

P-211- Therefore, it shall be a policy of Council to: Administer this plan and corresponding Zoning By-law in a judicious and expedient manner to curtail illegal land uses and to ensure a sense of security in Town.

TRANSPORTATION AND PARKING POLICIES

P-301(a) Therefore, it shall be a policy of Council to: Designate streets in the town as either arterial, collector or local and to identify these streets on a map entitled "Transportation" to be used in conjunction with the Future Land Use Map.

...

P-301(b) Therefore, it shall be a policy of Council to: Adopt the following criteria associated with street classifications designated in policy 301(a):

On Existing Arterial Roads to:

(i) limit on-street parking;
(ii) limit minor street access where alternatives are possible;
(iii) upgrade all intersections
(iv) provide turning lanes at all intersections
(v) maintain existing building setbacks and improvements where alternatives are possible especially at corners.

....

P-313 Therefore, it shall be a policy of Council to:
Require that all land uses in the town provide parking according to their use, such parking to be provided when:

- a new use comes into being
- an existing use changes, or
- an existing use is expanded.

P-314 Require that the parking requirement be provided within the same zone in which the use is permitted.

...

P-318 Therefore, it shall be a policy of Council to: Remove (or reduce) on-street parking on heavily used streets to facilitate improved traffic movement.

...

IMPLEMENTATION

This document is comprised of various maps which guide the establishment and subsequent changes to zoning within the town. These are:

(i) Future Land Use Map" which indicates the uses to which land may be put.

...

F. DEVELOPMENT AGREEMENTS

During the past few years the Town of Truro has worked with a Municipal Development Plan and Zoning by-law affording the Town the opportunity of dealing with growth and development in a predetermined fashion. This experience has enlightened Council to the fact that it is difficult to preconceive all forms of potential development which may be desirable in the town especially developments which are large and have a potential for substantial impact on the existing infrastructure. ......

Often, regardless of whether these developments can be accommodated by standard planning procedures and zoning techniques, there are no assurances that the development will maintain all of its displayed characteristics, the result being that major projects may adversely affect the integrity of a segment of the community. In order situations minor variance (Section 44 of The Planning Act may be too limited to permit a development which on the whole would be desirable. These and other situations have occurred and probably will occur. If it is desirable to have urban renewal or to maintain quality environments within the community it is desirable to have the flexibility to deal with major developments in a controlled fashion through Development Agreements [as provided for in (Section [33(2)(b)] and Section [44(14)] of The Planning Act)

The Evaluation of Development Agreements

It is clear that Development Agreements should be used with discretion. It would not be desirable for Council to be dealing with all developments in this fashion as the time and cost, both monetary and in administration, would be prohibitive. Therefore it is the intention of this plan to deal with those developments of a large scale by Development Agreements as outlined in this Plan, and only then at Council's discretion.

P-503 **Therefore, it shall be the policy of Council to: Consider (and may permit, consistent with this plan) developments, which may not otherwise be** permitted by the Zoning By-law, only by agreement pursuant to Section 33 (2)(b) and Section 34(1) of The Planning Act.

P-504 In evaluating a proposal for a development by Development Agreement Council shall have regard for, but shall not be limited to, the following matters:

1. The impact of the proposed development on:
   (i) abutting land uses
   (ii) municipal services
   (iii) pedestrian and motor traffic.

2. The suitability and availability of other appropriate sites in town for the proposed use.
3. Comments arising from a public hearing on the proposed development.

4. The submission of a site plan showing the location and scale of the structures on the lot, parking areas, landscaping, and building plans showing the nature and design of the proposed structure.

P-505- Hold a public hearing prior to entering any agreement. Procedures for public notice and hearing shall be the same as those required for zoning amendments as outlined in Section 38 of The Planning Act.

P-506 Include in any agreement made pursuant to Section 34 of The Planning Act terms and conditions necessary to ensure that the development is consistent with the policies of this plan. The agreement shall include, but shall not be limited to, some or all of the following:

(i) The specific use and size of the structure whether new, or an expansion, or renovation of an existing structure is proposed.

(ii) The compatibility of the structure with adjacent uses in terms of design.

(iii) The compatibility of the site, in terms of landscape design, with adjacent uses.

(iv) Provision for adequate buffering to screen the development from adjacent and dissimilar land uses which conform to this Municipal Development Plan.

(v) Provision for adequate set backs from adjacent land uses.

(vi) Any matter which may be addressed in the Zoning By-law.

(vii) Time limits for the initiation and completion of construction (and may include phased construction).

(viii) The provision of services and utilities.

(ix) Flood damage reduction controls with regards to possible floodplain development.

(x) Any other matter which Council feels is necessary to ensure the general compatibility of the use and structure with adjacent uses and structures.

Favretto v. City of Halifax

PLANNING--ZONING AMENDMENT--APPROVAL OF REZONING FROM R-4 TO R-2AM, WHICH WOULD PREVENT APARTMENT BUILDING--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--WHETHER UNDUE HARDSHIP--WHETHER EXTRAORDINARY AND COMPELLING CIRCUMSTANCES--PLANNING ACT, S. 63(3),(4),(5),(7)--CITY OF HALIFAX MPS, POLICIES 1.1, 1.2, 1.4, 1.4.1, 1.4.2, 1.6

This is an appeal by A.F. as an aggrieved person from a decision of the Council of the City of Halifax approving the rezoning of a 2.29 acre lot on Stoneybrook Court, a lot owned by the Appellant, from Multiple Dwelling (R-4) Zone to General Residential Conversion and Townhouse (R-2AM) Zone. The rezoning application was made by a condominium corporation in the area in order to thwart the proposed development of an apartment building. The Board is satisfied the decision has a substantial economic impact on the development potential of the lands and therefore the Appellant is an aggrieved person. The subject property is rough, wooded and undeveloped, surrounded to the south by R-4 property, to the east by C-2B, to the north by R-1 and the west by R-4. It is within the City's Municipal Planning Strategy (MPS), and is designated a "hard" Residential Environment (i.e., one that is excluded from a detailed area planning process). The development staff of the City recommended refusal of the rezoning.

HELD: The Board dismisses the appeal and confirms the decision of Council.

The three issues for the Board to determine are whether Council's decision reasonably carries out the intent of the MPS, whether the Appellant would suffer undue hardship and whether "extraordinary and compelling circumstances are present." Council's decision reasonably carries out the intent of the MPS, notwithstanding that the R-4 zoning also conformed to the intent of the MPS. The Board heard no evidence from the expert planners that any policies in the MPS prohibited Council's decision to rezone. All the planners conceded that both zones were in conformity with the MPS. On the issue of the "down-zoning" causing undue hardship, the Board agrees the decision will have an economic impact on the development potential of the property. Whether the impact is "undue", i.e., unjustifiable or excessive, is another matter. The term "hardship" in itself conveys the concept of severe suffering. No specific evidence was adduced to define the extent of the economic impact or that the development of the land is completely uneconomic. The Appellant has not suffered undue hardship. Despite serious charges of bad faith, the Board from the evidence is not willing to make this finding. No circumstances are present in the decision of Council which are extraordinary and compelling so as to warrant a reversal of the Board's finding.

NSMB-561-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An appeal by ANGELO FAVRETTO from a decision of the Council of the City of Halifax made October 16, 1986 which approved an amendment to the City's Land-use By-law by rezoning Lot K-9A-1 Stoneybrook Court from Multiple Dwelling (R-4) Zone to General Residential Conversion and Townhouse (R-2AM) Zone.

BEFORE: ELIZABETH SALTON - Member

COUNSEL: PETER J. MACKEIGAN, LL.B., and GREGORY H. COOPER, Articled Clerk for the Appellant;

WAYNE ANSTEY, Q.C., for the City of Halifax.

DECISION

The Board held a hearing on April 29 and 30, 1987, in the Expropriations Compensation Boardroom, 1660 Hollis Street, Suite 904, on an appeal by Angelo Favretto from a decision of the Council of the City of Halifax made October 16, 1986 which approved an amendment to the City's Land-use By-law by rezoning Lot K-9A-1 Stoneybrook Court from Multiple Dwelling (R-4) Zone to General Conversion and Townhouse (R-2AM) Zone. The application for this rezoning was made by a condominium corporation in the area of the subject property.

The Notice of Appeal dated November 10, 1986 was filed with the Board pursuant to Section 63 of the Planning Act on

November 12, 1986. The stated grounds of the appeal are as follows;

" [illegible]. That the decision cannot reasonably be said to carry out the intent of the Municipal Development Plan for the City of Halifax and the municipal planning strategy thereunder;

2. That the decision is inconsistent with good planning principals for the area or as embodied in the Municipal Development Plan for the City of Halifax;

3. That the decision cannot reasonably be said to be in the best interests of the community as a whole;

4. That the decision is inconsistent with other planning policies of the City of Halifax;

5. That the decision is incorrect on such other grounds as may arise from evidence presented before the Nova Scotia Municipal Board."

The Appellant is the owner of the property rezoned. From the evidence at the hearing the Board is satisfied that the decision of Council has a substantial economic impact on the development potential of the lands rezoned and therefore the Appellant is an aggrieved person able to appeal Council's decision pursuant to Section 63(1)(a) of the Planning Act. The Board satisfied itself that all preliminary matters had been properly carried out and with no objection from the parties proceeded to hear the appeal on the merits.

Six persons gave evidence for the Appellant. Four persons gave evidence for the City: three of the four were residents of the area.

The subject property is a rough, wooded, undeveloped lot 2.29 acres in size. It has street frontage on Stoneybrook Court which is a short street running north off Lacewood Drive in Fairview, ending in a cul-de-sac. To the south of the property is Stoneybrook Manor, a ten-storey apartment building containing 219 units. Stoneybrook Manor was built in 1974 by the Appellant and continues in the same ownership. To the east is a somewhat larger undeveloped lot, A-1B, also owned by the Appellant. Lot A-1B has no road frontage and is landlocked between the subject property and the Wandlyn Inn property which fronts on the Bedford Highway. To the north of the subject property are the rear yards of single family homes fronting on Laurel Lane or Laurentide Drive in the large residential development called Clayton Park. To the west of the subject property are several townhouse blocks containing from 5 to 7 units each which front on the cul-de-sac at the end of Stoneybrook Court or Braeside Lane which runs west off Stoneybrook Court to Lacewood Drive.

The zoning surrounding the subject property is R-4 to the south (Stoneybrook Manor), C-2B to the east, R-1 to the north and R-4 to the west.

An application for rezoning of the subject property was made by the President of Halifax County Condominium Corporation No. 27 on February 28, 1986 in order to thwart the proposed development of an apartment building on the subject property. The condominium corporation consists of 45 units in townhouses or low-rise apartment buildings generally located between Stoneybrook Court and Lacewood Drive in an area zoned R-4.

The area containing the subject property had been rezoned R-4 from General Building Zone in 1976. It is designated Residential Environment in the City's Municipal Planning Strategy (MPS). Policy 1.4.2 of the MPS identifies this area as a "Hard" area and it was therefore excluded from a detailed area planning process prescribed by the MPS for "Soft" areas such as the Bedford Highway area or other areas to the west in Fairview.

According to the staff report on the rezoning application prepared for City Council and dated June 5, 1986 (Exhibit F-5) the area in which the subject property is located was considered "basically stable with most of the land use fixed". At the time of the writing of the staff report a 7-storey, 58-unit apartment building had been proposed by the Appellant for Lot K-9A-1, the subject property.

Commenting on the proposed rezoning, the staff report states:

> " With respect to character, scale and compatibility of development on Lot K-9A-1, it is felt that a similar development intensity would be permitted, whether the lot was zoned R-2AM as requested; R-3, which is the development control for the lot to the east (Lot A-1B), or the current R-4 Zone. A study of the site for the R-2AM Zone indicated that approximately 30 townhouses or 56 apartments could be erected on the site with an extension of Stoneybrook Court.
>
> The differences between the R-2AM and R-3 controls and the R-4 controls are basically height and setbacks. The former two would be at a lower height; R-2AM being restricted to 35 ft. and R-3 being restricted to 50 ft. The proposed 7 storey R-4 building would be approximately 63 ft.

> Setbacks for the R-2AM Zone would be 12 ft. on the side lines, 10 to 29 ft. for the R-3 use and approximately 37 ft. for the R-4 use.
>
> The R-2AM and the R-3 uses would use up much more land because the number of units would be spread out over a wider area.
>
> Staff is of the opinion that any of these forms of housing could be constructed and maintain the character of the area and be compatible in scale with the area. The low rise buildings would repeat the scale of the townhouses on Stoneybrook and Braeside Lane; however, the high rise building would be set back further from the lot lines and provide better separation between uses.
>
> Without any evidence of any major change to the area or any obvious incompatibility with the neighbourhood, staff is reluctant to recommend that the rezoning be approved. Council has the option to consider the R-2AM Zone for which the application was made, the R-3 Zone, or to leave the R-4 Zone as is. Staff is of the opinion that the R-4 Zone should remain."

A later Staff report dated September 15, 1986 states that under R-4 Zoning Lot K-9A-1 (the subject property) could be developed with "approximately 63 dwelling units and Lot A-1B could accommodate approximately 87 dwelling units". The only feasible street access for both parcels appears to be from the end of Stoneybrook Court.

Permissible uses in the R-2AM Zone are R-1, R-2 and R-2P uses (Single Family, Two-Family and General Residential Zone allowing not more than 4 apartments in a building); attached or stacked attached row or townhouses; and an apartment house to a maximum of 14 units.

Permissible uses in an R-4 Zone are R-1 and R-2 uses, a boarding house, a lodging or rooming house, and an apartment house.

The staff report of June 5, 1986, quotes the following policies of the MPS as relevant to the proposed rezoning:

> "1.1 Residential development to accommodate future growth in the City should occur both on the Peninsula and on the Mainland, and should be related to the adequacy of existing or presently budgeted services.
>
> 1.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.
>
> 1.4 Because the differences between residential areas contribute to the richness of Halifax as a city, and because different neighbourhoods exhibit different characteristics through such things as their location, scale, and housing age and type, and in order to promote neighbourhood stability and to ensure different types of residential areas and a variety of choices for its citizens, the City encourages the retention of the existing residential character of predominantly stable neighbourhoods, and will seek to ensure that any change it can control will be compatible with these neighbourhoods.
>
> 1.4.1 Stability will be maintained by preserving the scale of the neighborhood, routing future principal streets around rather than through them, and allowing commercial expansion within definite confines which will not conflict with the character or stability of the neighbourhood, and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.
>
> 1.6 The development of vacant land, or of land no longer used for industrial or institutional purposes within existing residential neighbourhoods shall be at a scale and for uses compatible with these neighbourhoods in accordance with this Plan, and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

Dario Favretto, son of the Appellant, supervises his father's property in Nova Scotia. He said that it had always been his father's intention to build a second apartment building as the market warranted on the lands on which Stoneybrook Manor was constructed, from which Lot K-9A-1 had been subdivided. Prior to the rezoning of the subject property the Appellant had applied for a building permit to construct a 64-unit brick and concrete apartment building of 6/7 stories on the subject property.

According to Mr. Favretto there is a covenant on the land from its original owner, Clayton Developments Limited, requiring brick construction which would mean an economic hardship in the construction of townhouses which are usually of less expensive wood frame construction. Although the City's planning staff had estimated that 30 townhouses or 54 apartments could be built on the subject property within the provisions of the R-2AM Zone, Mr. Favretto estimated that only 15 townhouse units could be practically constructed and they would require extensive and expensive blasting of the bedrock and stripping the site. Mr. Favretto said that a single apartment building on the subject property would retain more open space surrounding it than townhouse development and would generate significantly less traffic than townhouses.

Cary Vollick, a landscape architect, had analyzed the slopes and bedrock of the subject property for the feasibility of development with either townhouses or 14-unit apartment buildings. Exhibits F-13 and F-14 show potential layouts of townhouses and apartment buildings respectively on the site, indicating that 29 townhouses or four 14-unit apartment buildings plus two townhouses could be accommodated on the subject property. He concluded however, that one larger apartment building would have the least impact on existing development in the area because it would occupy the least area. Because of the set backs required in the R-2AM Zone and the topography of the site, a single apartment building would be the least expensive development for the subject property in his opinion.

Several members of the condominium corporation gave their reasons for their application to "down-zone" the subject property. They had been concerned primarily that a large apartment building would cause excessive traffic on the Stoneybrook Drive cul-de-sac and adjacent streets which are all comparatively narrow and difficult for traffic already, especially in winter. As well, there were concerns that additional traffic from Lot A-1B to the east of the subject property, if developed, would use the same access to Stoneybrook Court by crossing over the subject property. The witnesses concerned with potential traffic increases believed that townhouses rather than a large apartment building would generate less traffic. Some had concerns about the possibility of devaluation of their property.

Three qualified planners analyzed the merits of the rezoning of the subject property. Bill Campbell, Development Administrator with the City, had presented the staff report to

Council which recommended refusal of the rezoning application. He agreed with the report's conclusion that there was no compelling reason to change the zoning of the subject property from R-4 which was in compliance with the policies of the MPS to R-2AM which was a zone originating in the Fairview Secondary Planning Strategy. He concluded that R-4 zoning for the subject was consistent with the MPS but R-2AM was not inconsistent with the MPS.

Maurice Lloyd, Manager of UMA Engineering Ltd., giving evidence for the Appellant argued that no change in zoning had been necessary. His report (Exhibit F-23) concludes:

> ".....Given the fact that the R-4 Zone has been in place since 1976 and was re-instated with the adoption of the present Municipal Development Plan in 1978 plus considering the additional high density residential and commercial uses that have been(or are being) established, there is no rational planning basis for the change. The height and bulk of the proposed building is in keeping with the character of the area and decreasing the height, which means increasing the lot coverage, achieves nothing.
>
> In my opinion, the uses and controls in the Multiple Dwelling (R-4) Zone are more appropriate to the Plan policies than those in the R-2AM Zone."

Mr. Lloyd said that he would "have to agree" that Council's decision reasonably carried out the intent of the MPS but he believed that the original R-4 zoning was more appropriate because of the property's topography and the character of surrounding uses. Careful siting and screening would be possible with a high rise building as allowed in the R-4 Zone, whereas a lower building or buildings would result in great lot coverage and less opportunity for buffering from adjacent uses. He agreed that it was not possible to argue that R-2AM zoning for the subject property was inconsistent with the MPS.

John Hesseltine, a Planner II with the City's Planning division, acknowledged that there had been some disagreement between the Planning division and the Development Department on whether the rezoning of the subject property from R-4 to R-2AM should be recommended to Council. Mr. Hesseltine believed that there was a basis for a positive recommendation to Council in the recent approval of the Bedford Highway Secondary Planning Strategy which had changed the Wandlyn Motel property and Lot A-1B which is adjacent to the subject property from M(Motel) Zone to C-2B (Highway Commercial) Zone. The C-2B Zone allows low-rise apartment buildings and for this reason Mr. Hesseltine believed that R-2AM zoning would be compatible on the subject property. Mr. Hesseltine believed that Council's decision reasonably carried out the intent of the MPS.

The Sections of the Planning Act which govern the Board's decision in this appeal are the following:

> "63(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.
>
> 63(4) The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council

> amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> 63(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.
>
> ....
>
> 63(7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present."

The Board has considered the evidence and argument presented in this appeal and visited the site and surrounding area. The three issues for the Board to determine are whether the Council's decision reasonably carries out the intent of the MPS, whether the appellant would suffer undue hardship as a result of Council's decision and whether "extraordinary and compelling circumstances are present". Although the last two issues were not cited initially as grounds for the appeal, Counsel for the Appellant indicated at the beginning of the hearing that he would lead evidence on that subject and both Counsel presented argument on the issue in their post-hearing briefs.

1. Did Council's decision reasonably carry out the intent of

the MPS?

The Board is of the opinion that it did, notwithstanding evidence that the R-4 zoning of the subject property also conformed to the intent of the MPS. Although Council could have refused to approve the application to rezone and so carried out the intent of the MPS, the Board heard no evidence from the expert planning witnesses that any policies in the MPS prohibited Council's decision. For the Board in this appeal the operative word in Section 63(3) of the Act is "reasonably". Expert planners preferred the R-4 Zone to R-2AM for the subject property, or vice versa, but all conceded that both zones were in conformity with policies in the MPS. Whether or not Council's decision was necessary is irrelevant when both zones under consideration meet the intent of the MPS and no policies prohibit such a rezoning.

2. Will the Appellant (Applicant) suffer undue hardship as a result of Council's decision?

Counsel for the Appellant argued that the "down-zoning" of his client's land had caused undue hardship. The Board agrees that Council's decision to rezone the subject property will have an economic impact on the development potential of the property. Whether the impact is "undue", i.e., unjustifiable or excessive, is another matter. The term "hardship" in itself conveys the concept of severe suffering. No specific evidence was adduced at the hearing to define the extent of the economic impact of the rezoning on the Appellant.

The subject property is a residual parcel of the lands in which the Appellant developed Stoneybrook Manor, which the Board understands has been an economically successful project for the developer. The parcel adjacent to the subject property to the east, also owned by the Appellant, is subject to development controls limiting high density residential development. From the evidence at the hearing it appears that the Appellant individually and in partnerships owns a number of properties with development potential. It would seem unlikely that each development project would yield a similar rate of return on the investment. The Board heard no evidence that the rezoning of the subject property would make its development completely uneconomic. The Board concludes that the Appellant has not suffered undue hardship as the result of the rezoning of the subject property.

3. Are there extraordinary and compelling circumstances present?

Counsel for the Appellant argues that Section 63(7)(b) of the Planning Act is "designed to give the Board a discretion to rectify an obvious error, inequity or an injustice". He contends that the rezoning application was a method of forcing concessions from the developer and that the rezoning process is invalid because of bad faith on the part of the Condominium Corporation (the Applicant) and the alderman for the area, and because of questions regarding the ambiguity or nature of Council's vote on the application. These are serious charges.

The Board from the evidence at the hearing is not willing to find that the Condominium Corporation made or pursued the application for rezoning in bad faith.

The alderman representing the Ward in which the subject property is located allegedly met with the Condominium Corporation without the developer or his representative present to discuss the rezoning application and the applicant's strategy at the public hearing on the matter. The Board does not consider that this alleged consultation is evidence of bad faith. Elected representatives are frequently called upon to assist individuals or groups whose aims are not compatible with all other interests. This alleged consultation and/or "coaching" preceded the Council's public hearing. At that hearing the Staff report recommended refusal of the rezoning application and the Appellant was able to argue his case for refusal before Council. The reasons for the decision by a majority of aldermen to approve the application are not a matter for the Board to inquire into or take into account in coming to a decision on whether or not Council's decision reasonably carries out the intent of the MPS.

The reference to the nature of Council's vote on the rezoning application is addressed in a memorandum from the City Solicitor to the Mayor and Council dated October 22, 1987 which is part of Exhibit F-5. The memo refers to a letter from the Appellant's Solicitor alleging that a majority of aldermen had not voted on the matter. The Board is persuaded by the City Solicitor's memo that there was no error in the result of

Council's vote on the rezoning application.

The Board finds no circumstances present in the decision of Council which are extraordinary and compelling to warrant a reversal of the Board's finding that Council's decision reasonably carries out the intent of the MPS.

For the reasons stated, the Board dismisses the appeal and confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 17th day of December, A.D., 1987.

EASalton

ELIZABETH SALTON
Member

Andrews v. District of East Hants

PLANNING--ZONING AMENDMENT--APPROVAL TO REZONE FROM R-2 TO C-2--PORTION DESIGNATED FLOODPLAIN--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--MUNICIPAL BOARD ACT, S. 25(1)--PLANNING ACT, S. 63(1)--DISTRICT OF EAST HANTS: ELMSDALE/ENFIELD MPS, SECTION 2.3, POLICIES P4-17, P6-4, P9-1

This is an appeal by R. J.A. as an aggrieved person from a decision of the Council of the Municipality of the District of East Hants rezoning a lot of approx. 60,500 sq. ft. on Trunk Highway No. 2 from General Residential Single and Two Family (R-2) to Commercial Highway (C-2) Zone. On the opposite side of the highway from the subject lands are a number of commercial and industrial uses, and across the highway from the Appellant's home is Airport Auto Sales. The applicant sought the rezoning with the intention of selling the land to Airport Auto Sales for the development of a car lot, including an 800 sq. ft. sales office and showroom. The area is within a Municipal Planning Strategy (MPS) that applies in the Elmsdale and Enfield Districts. Most of the subject property is designated Residential Subdivision on the Generalized Future Land Use Maps (Gen. FLUM.) in the MPS. The Planner recommended approval and feels it appropriate that commercial uses be located along Highway No. 2 where there will be a high degree of visibility. The Planning Advisory Committee also recommended approval.

HELD: The Board allows the appeal and reverses the decision of Council.

After the hearing the Board discovered that a portion of the subject property has been designated Environmental Open-Space: Floodplain Low Potential (01) Zone on the Gen. FLUM. Policy P6-4 of the MPS is quite specific in stating Council's intention not to permit the rezoning of such land to Commercial Highway. The Floodplain Zone portion fronts on Highway No. 2 and access to the car lot would be from Highway No. 2. The Floodplain Zone cannot be rezoned to Commercial Highway (C-2) Zone. Such a rezoning does not reasonably carry out the intent of the MPS.

Application for Leave to Appeal was made to the Nova Scotia Supreme Court, Appeal Division, by the Municipality of the District of East Hants. The Application was granted. The Appeal Division ordered that the matter be remitted to the Board for further hearing and consideration. The decision of the subsequent hearing will be reported in the Board's 1988 edition of planning decisions.

NSMB-586-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal by RUSS J. ANDREWS from a decision of the Council of the Municipality of the District of East Hants amending the Land-Use By-law by amending an area in the Enfield/Elmsdale District Boundary from General Residential Single and Two Family (R-2) Zone to Commercial Highway (C-2) Zone on the application of PIONEER PROJECTS LTD.

BEFORE: LINDA D. GARBER, Vice-Chairman

COUNSEL: RUSS J. ANDREWS, on his own behalf;

ROBERT CARRUTHERS, LL.B., for the Municipality of the District of East Hants;

TOM PARKER, for the Applicant, Pioneer Projects Ltd.

DECISION

This is an appeal by Russ J. Andrews under Section 63(1) of the Planning Act respecting a decision made by the Council of the Municipality of the District of East Hants on June 9, 1987, approving an amendment to the Municipality's Land-Use By-law by rezoning a lot approximately 60,500 square feet in size, located on Trunk Highway No. 2 in the area of the Enfield/Elmsdale District Boundary from General Residential Single and Two Family (R-2) Zone to Commercial Highway (C-2) Zone on the application of Pioneer Projects Ltd.

The Notice of Appeal is dated June 29, 1987 and was received by the Board on June 30, 1987. The hearing took place in the Council Chambers of the Municipality of the District of East Hants on November 26, 1987.

At the commencement of the hearing, Mr. Carruthers, Counsel for the Municipality, raised the issue of whether or not the Notices of Hearing had been served by the Appellant in accordance with the Rules. Mr. Andrews filed an Affidavit, marked Exhibit A-1, stating that he had served 5 of the persons who were listed in a letter to him dated October 21, 1987 and signed by Doreen White, Clerk of the Board. He further testified that he had served persons residing within 500 feet of the subject property but had neglected to serve some of his immediate neighbours until the day before the hearing. On questioning, he stated that other than his immediate neighbours, he had served the various persons by mailing a copy of the Notice of Hearing that was prepared by the Clerk. It was suggested by Mr. Carruthers that the Applicant had not been served but subsequently it appeared that the Applicant meant that he had not been personally served by the Appellant. The Board referred to the decision in Town of North Sydney v. County of Cape Breton (1983) 2 N.S.M.B. 619 in which it was decided that the service of Notices of Hearing on persons living within 500 feet of the subject property was directory and not mandatory and that failure to serve the Notices was not fatal to hearing the merits of the appeal. The Board noted that in accordance with Section 25(1) of the Municipal Board Act, the Notice of Hearing had appeared for three consecutive weeks in The Weekly Press, a newspaper circulating in the Municipality. The Board asked if the Municipality or the Applicant wished an adjournment but they declined. The Board ruled that it had jurisdiction to hear the merits of the appeal.

The Appellant testified on his own behalf. The Municipality called the Planner, Brad Hodgins. Curtis Clarke, Councillor for the District spoke in opposition to the rezoning. Tom Parker, a principal officer of the Applicant, Pioneer Projects Ltd., testified as well. The Board also received a letter from S.C. Brewer, President of the Elmsdale and District Ratepayers Association, opposing the rezoning.

The subject property is located on the north side of Trunk Highway No. 2 close to the Elmsdale/Enfield District Boundary. The subject property is 60,500 square feet and is part of a larger lot owned by the Applicant. To the east of the property is Kali Lane, formerly Nova Road, which has been realigned and deeded to the Province. Immediately to the rear of the property is a home in which Mr. Parker's mother-in-law resides. Immediately to the west is a large lot and home owned by Robert Fisher. The Baptist Church is located next to the Fisher property. The Appellant's home is located approximately 200 yards east of the subject property. Another home is located between the Appellant's home and the subject property. On the south side of Highway No. 2 there are a number of commercial and industrial uses. Airport Auto Sales is located across the highway from the Appellant's home.

The Applicant sought the rezoning with the intention of selling the land to Airport Auto Sales for the development of a car lot. An 800 square foot building is to be constructed on the site to be used as a car sales office and showroom.

The Municipality has adopted a Planning Strategy which applies in the Elmsdale and Enfield Districts among others. The Planning Strategy includes Generalized Future Land Use Maps (hereinafter "Gen.FLUM"). Most of the subject property is designated Residential Subdivision on the Gen.FLUM and is zoned General Residential Single and Two Family (R-2) Zone. The Applicant applied for rezoning to Commercial Highway (C-2) Zone.

The majority of the land between Highway No. 102 and Trunk Highway No. 2 in the Enfield and Elmsdale Districts has been designated Residential Subdivision. Except for a large parcel which is zoned Industrial, and on which the Elmsdale Lumber Mill is located, there are very few other designations in this area except for lands designated as Environmental Open Space: Floodplain Low or High Potential.

At the hearing the evidence addressed the issue of whether or not the Planning Strategy permits a rezoning from Residential Subdivision to Commercial Highway. It was the view of the Appellant, Councillor Clark and the President of the Elmsdale and District Ratepayers Association that during the Public Participation Program which preceded the adoption of the

Planning Strategy that the residents had expressed their desire to restrict commercial development to certain areas and that the designation of land as Residential Subdivision was intended to carry out this desire. The Planner, Brad Hodgins, who was also involved at the time of the Public Participation Program, is of the opinion that the reason that this area was designated Residential Subdivision was in part due to the fact that there was no consensus where the commercial area should be focused. Those areas that have been designated Commercial on the Gen.FLUM are generally existing commercial uses. He believes that the Planning Strategy does permit the rezoning of lands designated Residential Subdivision to Commercial and feels that it is appropriate that commercial uses be located along Highway No. 2 where there will be a high degree of visibility. Both the Planning Advisory Committee and the Council concurred with the Planner's recommendation that the rezoning be approved.

While certain sections of the Planning Strategy appear to support Mr. Andrews' position that an area designated Residential Subdivision should not be rezoned Commercial, it is clear that other provisions in the Planning Strategy permit rezonings. Section 2.3 of the Planning Strategy sets out the guidelines for the application of the Gen.FLUM designations and states that in most cases the zone "reflects the existing land uses, which are predominately residential and the transition to commercial land uses is done through a zoning amendment". Policy P4-17 provides as follows:

> "It shall be the intention of Council to permit Commercial Highway (C2) development, less than 15,000 square foot area, within the Gen.FLUM designations "Commercial, Industrial, Residential Subdivision and Rural Residential and Natural Resource", by Land-Use By-law amendment, provided outdoor storage and display is adequately screened from abutting residential and special use land uses and provided the rezoning criteria of Section 9, Pg-1 are satisfied."

The Planner was satisfied that the criteria of Policy P9-1 was satisfied.

In reviewing the maps which were included in Exhibit A-4 after the hearing, the Board discovered that a portion of the subject property has been designated Environmental Open Space: Floodplain Low Potential (01) Zone on the Gen.FLUM. It appears from the documents filed that no one focused on this aspect at the time that Council approved the rezoning and the issue was not addressed at the appeal hearing. Policy P6-4 is quite specific in stating that Council's intention is "not to permit" the rezoning of Environmental Open Space: Floodplain Low Potential (01) Zone to Commercial Highway.

The subject property has frontage on both Highway No. 2 and Kali Lane. The Environmental Open Space: Floodplain Low Potential (01) Zone designation covers that part of the subject property which fronts on Highway No. 2 and Kali Lane. There is, at present, no other possible access to the property from the highway or Kali Lane which would not cross the Floodplain Zone.

This is a rezoning to Commercial Highway (C2) Zone. Access to the highway is required in such a zone. One of the concerns mentioned in the Planner's Report was that access to the car lot should be directly from Highway No. 2. Since the road frontage of the subject property is designated Environmental Open Space: Floodplain Low Potential (01) Zone and is covered by Policy P6-4, it cannot be rezoned to Commercial Highway (C2) Zone.

The Board is therefore of the opinion that the rezoning to Commercial Highway does not reasonably carry out the intent of the Planning Strategy. Pursuant to Section 63(4) of the Planning Act the Board allows the appeal and reverses the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of December, A.D., 1987.

Linda Garber
LINDA GARBER
Vice-Chairman

Re Ratepayers of Mattie Settlement and Grosvenor

MUNICIPAL BOUNDARIES—ANNEXATION—APPLICATION BY RATEPAYERS OF THE AREA—WHETHER NECESSARY--WHETHER EXPEDIENT--FINANCIAL IMPLICATIONS AND BURDEN OF TAXATION—WHETHER IN BEST INTERESTS OF INHABITANTS OF AREA—SOCIAL IMPLICATIONS--MUNICIPAL BOARD ACT, S. 27(1)(b)--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, SS. 2, 6, 11, 20(1)(b), 22--VILLAGE SERVICES ACT, S. 14A(1)

This is an application by certain ratepayers of Mattie Settlement and Grosvenor to annex an area within the Municipality of the District of Guysborough to the Municipality of the County of Antigonish. As a result of a Preliminary Order of the Board made in 1986 certain studies had been carried out in connection with the proposed annexation. The area in question is roughly rectangular in shape covering 3.8 sq. mi., includes the western extremity of Highway 16 running from Monastary to the community of Guysborough, has two communities and a population of 120 persons, and is wooded with some cleared fields. No one living in the area proposed for annexation opposed the application.

HELD: The proposed annexation is granted. No parties requested costs and no costs are awarded.

This application is the first to be considered under the wider range of factors to be considered in relation to annexation questions which came into force Oct. 1, 1985. The factors now against which the Board must measure the annexation application are, in no order of priority: necessity, expediency, the financial position of the municipality affected, the financial obligations of the municipalities affected, the burden of taxation upon the ratepayers, the best interests of the inhabitants of the area, the social implications and other relevant matters. While a case for the necessity of this annexation has not been made out by the Applicants, the Board accepts that expediency has been proven. This is so in relation to their concerns about schooling and the ability of adults and children to continue to participate in activities located in Antigonish. The strong social and religious affinity of the residents of the area to the nearby communities and institutions in Antigonish, together with their genuine longstanding concern that the children of the area should continue to attend schools in Antigonish makes annexation expedient. While the proposed annexation would have a negative financial impact on Guysborough and Guysborough is in a less healthy financial state than Antigonish, the issue to be decided is whether the estimated financial impact on the Municipality and therefore ultimately on its ratepayers is significant, and if significant, should be a major determinant in the Board's decision. The effect on the Guysborough residential tax rate would be no more than the increase that took place in 1985 and could be considerably less, depending on how Council decided to allocate the impact between residential and commercial tax rates. In considering the best interests of the inhabitants of the area, it is the

inhabitants of the area of Mattie Settlement and Grosvenor whose best interests should be primarily considered, even though their best interests may not be perceived to be identical with the best interests of the remaining inhabitants of Guysborough. The best interests of the inhabitants of the area would be satisfied by the proposed annexation since it would secure the continued education of area children in Antigonish schools and realign the boundary to reflect the existing community of interest with inhabitants of nearby communities in Antigonish. The existing social affinity with Antigonish would be solidified by annexation. The Board notes an apparent lack of opposition by concerned citizens or individual elected representatives of Guysborough, while there exists a cohesive sense of community and determination by residents of Mattie Settlement and Grosvenor to ensure that municipal boundaries complement the community's orientation.

Application for Leave to Appeal was made to the Nova Scotia Supreme Court, Appeal Division, by the Municipality of the District of Guysborough. The Municipality was denied leave to appeal.

NSMB-13-85-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, 1982, S.N.S., Chapter 10;

- and -

IN THE MATTER OF: An Application by Certain Ratepayers of the area of Mattie Settlement and Grosvenor to annex an area of land within the Municipality of the District of Guysborough to the Municipality of the County of Antigonish.

BEFORE: ELIZABETH SALTON, Vice-Chairman

COUNSEL: ALEXANDER G. MACDONALD, LL.B., and CAROLE GILLIES, Articled Clerk, for the Applicants;

M. LOUISE CAMPBELL, LL.B., for the Municipality of the District of Guysborough;

JEAN C. MACPHERSON, Q.C., and CATHERINE MACNEIL, LL.B., for the Municipality of the County of Antigonish.

DECISION

The hearing of this application by certain ratepayers of the area of Mattie Settlement and Grosvenor to annex an area within the Municipality of the District of Guysborough to the Municipality of the County of Antigonish took place on October 22 and 23, 1986, in the Fire Hall at Monastery, after due notice, as ordered in a Preliminary Order of the Board dated July 28, 1986, issued pursuant to Section 11 of the Municipal Boundaries and

Representation Act following the hearing of the application for a Preliminary Order held in the Fire Hall in Monastery on July 22, 1986.

The Preliminary Order stated:

> "IT IS HEREBY ORDERED, pursuant to Section 11 of the Municipal Boundaries and Representation Act, S.N.S. 1982, Ch. 10:
>
> 1. That the suggested boundaries of the area proposed to be annexed be those as described in Appendix "A" to the Application, being Exhibit M-6, and as shown on a plan of survey which accompanied the application, being Exhibit M-7;
>
> 2. That a comprehensive study be undertaken by the applicants
>
>   (a) to examine the necessity or expediency of the order applied for,
>
>   (b) to examine the financial and social implications of the proposed annexation for the area proposed to be annexed;
>
>   (c) to examine the financial impact on the Municipality of the County of Antigonish of the proposed annexation, and
>
>   (d) to examine the financial and other implications of the proposed annexation to both the Guysborough District School Board and the Antigonish District School Board.
>
> 3. That a study be undertaken by the Municipality of the County of Guysborough to examine the financial and other implicatons to the Municipality of the proposed annexation including the financial impact on its ratepayers, and the financial and other implications to the Guysborough District School Board.
>
> 4. That the studies by the applicants and by the Municipality of the County of Guysborough be filed with the Board on or before September 15, 1986.

> 5. That a public hearing on this application for annexation shall be heard by the Board, after due notice, at the Fire Hall in Monastery commencing at 10:30 A.M. on October 22, 1986."

This application for annexation originated with a letter and other materials (Exhibit M-8) from Rev. Frank Morley of Tracadie dated March 26, 1985, and received by the Board March 28, 1985. The letter, addressed to the Chairman of the Board, stated:

> "Dear Mr. Blois:
>
> Over fifty ratepayers from the Mattie Settlement, Grosvenor, Guysborough Road area of the Municipality of the County of Guysborough have asked me to make application to the Municipal Board on their behalf. They wish to withdraw from the County of Guysborough and be joined to the County of Antigonish. I enclose a copy of their signatures. All but one of the ratepayers of the area signed this application. I also enclose a map indicating the area involved."

The letter was accompanied by a petition listing grounds for the application, a copy of a list of assessed ratepayers in the area concerned, a copy of a list of signatures of those ratepayers requesting annexation, and a map prepared by Strait Engineering Limited of Tracadie showing the boundary of the Municipality of the County of Antigonish and the Municipality of the District of Guysborough and indicating the area for which annexation was proposed. The Board responded by a letter to Rev. Morley dated March 28, 1985, requesting a new application containing additional or more detailed information.

On March 13, 1986, the Board received a new application (Exhibit M-2) submitted by Alexander G. MacDonald on behalf of the Applicants in Mattie Settlement and Grosvenor. This application for a Preliminary Order was made under the new Municipal Boundaries and Representation Act, S.N.S. 1982, Chapter 10, which had come into force in the intervening year on October 1, 1985. Exhibit M-2 was accompanied by two Affidavits by Rev. Frank Morley (Exhibit M-3) and Wayne Carter (Exhibit M-4) as witnesses to the Applicants' signatures on a "petition", (Exhibit M-5). The preamble to Exhibit M-5 states:

> " CONSENT
>
> WE, THE OWNERS OF LANDS LOCATED IN THE MUNICIPALITY OF THE COUNTY OF GUYSBOROUGH, NOVA SCOTIA, DO HEREBY CONSENT TO AN APPLICATION BEING MADE TO THE MUNICIPAL BOARD (PROVINCE OF NOVA SCOTIA) ON BEHALF OF OURSELVES TO HAVE ALL REAL ESTATE SITUATED ALONG THE GUYSBOROUGH - ANTIGONISH COUNTY LINE IN THE AREA OF MATTIE, GROSVENOR AND GUYSBOROUGH ROAD IN THE COUNTY OF GUYSBOROUGH ANNEXED TO THE MUNICIPALITY OF THE COUNTY OF ANTIGONISH. WE HEREBY CONFIRM THAT IT IS OUR DESIRE THAT THE PROPERTY OWNED BY US BE ANNEXED TO AND FORM PART OF THE COUNTY OF ANTIGONISH, A MUNICIPAL CORPORATION OF THE PROVINCE OF NOVA SCOTIA. TO THIS END WE AFFIX OUR SIGNATURES IN OUR OWN HANDWRITING.
>
> DATED AT MONASTERY, NOVA SCOTIA THIS 18TH DAY OF APRIL, A.D., 1985."

There are 79 signatures on Exhibit M-5 each witnessed by Rev. Frank Morley or Wayne Carter. A metes and bounds description of the area proposed to be annexed marked Schedule "A" (Exhibit M-6), accompanied this application together with a plan of the area marked Schedule "B" (Exhibit M-7). Schedule "A" reads as follows:

> " **SCHEDULE "A"**
>
> All that certain lot, piece or parcel of land situated, lying and being in the County of Guysborough, Province of Nova Scotia as shown on a plan titled "Plan showing an area of land enclosed within the bounds of the letters A,B,C and D, containing 3.8 square miles (9.9 square km)

presently within the Municipality of the County of Guysborough but proposed to be annexed to the Municipality of the County of Antigonish" signed on the 1st day of June, A.D. 1985 by John J. DeLorey, Nova Scotia Land Surveyor, the said parcel being more particularly described as follows:

BEGINNING at a point in the county line, said point referred to as point "A" and being north seventy three degrees fourteen minutes fifty five seconds east (N73° 14' 55"E) a distance of five hundred and fourteen decimal eight one three (514.813) metres from Nova Scotia Coordinate Monument No. 11094;

THENCE (from the point of beginning) south twenty two degrees fifty seven minutes fifteen seconds east (S22° 57' 15"E) a distance of one thousand two hundred and ten decimal zero zero zero (1210.000) metres to a point referred to as point "B";

THENCE south fifty three degrees sixteen minutes forty five seconds west (S53° 16' 45"W) a distance of six thousand and fifty five decimal three seven seven (6055.377) metres to a point referred to as point "C";

THENCE north thirty one degrees thirty nine minutes fifty five seconds east (N31° 39' 55"E) a distance of two thousand and twenty three (2023) meters more or less to a point on the county line referred to as point "D";

THENCE north sixty one degrees east (N61° E) a distance of six thousand two hundred and twenty two (6222) metres more or less along the existing county line to the place of beginning.

The above described parcel of land contains 9.9 square kilometres or 3.8 square miles.

All bearings are referred to the Nova Scotia 3° modified transverse mercator projection, zone 4, central meridian 61° 30' west longitude."

Counsel for the Applicants filed an Affidavit (Exhibit M-17) proving advertisement of the Notice of Hearing in both The Casket (Antigonish) and the Scotia Sun (Port Hawkesbury), two local newspapers, for three consecutive weekly insertions on October 1, 8 and 15, 1986.

At the commencement of the hearing, three reports previously filed with the Board as required by the Preliminary Order, were filed as exhibits. Exhibit M-18 is an analysis of the financial impact of the proposed annexation prepared for the Applicants by Robert French of the firm of Thorne, Ernst and Whinney, Chartered Accountants; Exhibit M-19 is a report on the financial and other implications of the proposed annexation for the Municipality of the District of Guysborough, prepared by Cheryl V. Tynski, Municipal Clerk-Treasurer; Exhibit M-20 is a report on the financial and other implications to the Guysborough County District School Board, prepared by Ian Stewart.

In total, seventeen persons gave evidence at the hearing: thirteen were called by Counsel for the Applicants and four by Counsel for the Municipality of the District of Guysborough (Guysborough). Counsel for the Municipality of the County of Antigonish (Antigonish) called no evidence and did not actively participate in the hearing.

The area in Guysborough proposed for annexation is roughly rectangular in shape covering 3.8 square miles, lying on the south side of the Antigonish-Guysborough County line which runs northeast-southwest. Highway 16 running south from Monastary to the community of Guysborough is within the boundary of the area proposed for annexation, at its western extremity. The community of Mattie Settlement is approximately in the center of the area and the community of Grosvenor towards the eastern boundary along the old Mulgrave Road. The area is wooded, with some cleared fields and sparsley settled. The population of the area is approximately 120 persons.

Wayne Carter, a fisherman working out of Canso and a property owner who has lived with his family in Mattie Settlement for 17 years, testified that he was one of the property owners who authorized the application for annexation and one of the witnesses to signatures on Exhibit M-5 as stated in his Affidavit (Exhibit M-4).

The "consent petition" was drawn up with information on property ownership obtained from the Antigonish-Guysborough Assessment Region Office in Guysborough. It was presented to a public meeting of people from Mattie Settlement, Grosvenor and adjacent areas held at the Fire Hall at Monastery on April 29, 1985. Many signatures were obtained at that meeting, the balance were collected by a door to door canvass.

Mr. Carter reviewed the reasons why some assessed property owners had not signed the "consent". Two of the twenty-three assessed owners who did not sign are deceased, four had moved to Antigonish County and two had recently sold their property. Several property owners had wished to remain neutral because of their employment with either Antigonish or Guysborough and the remainder had been away from home and could not be contacted.

Mr. Carter said that some ratepayers in the area were non-resident property owners but all had been notified at the public meeting of the intention to consider annexation.

He said he believed that there were 14 signatures of non-resident property owners on the "Consent Petition" (Exhibit M-5) and that it represented as accurate a list of area ratepayers as possible.

Mr. John Joseph DeLorey, a licensed Nova Scotia Land Surveyor living in Linwood, Antigonish County, gave evidence on the plan of the area proposed for annexation which he prepared as instructed in May 1985 by Rev. Morley. Exhibit M-7, a plan prepared by Mr. Delorey and dated June 1, 1985, is entitled "Plan showing an area of land enclosed within the bounds of the letters A, B, C and D containing 3.8 square miles (9.9 square km.) presently within the Municipality of the County of Guysborough but proposed to be annexed to the Municipality of the County of Antigonish". The "notes" on Exhibit M-7 state that: "This plan was prepared for the purpose of a description for the area of land enclosed within the bounds of the Letters A, B, C and D. Coordinates were calculated from a plan of survey by Brian J. Cameron, N.S.L.S. showing crown land at Linwood, Antigonish Co., reconveyed under document No. 1764 and from resource maps. The accurate locations of all boundaries are subject to a field survey". The coordinates of A, B, C and D are set out in Schedule "A" to the application (Exhibit M-6).

Mr. Delorey said that he determined where the boundaries of the proposed annexation area should be from a sketch he was given and a visit to the area accompanied by Mr. Carter. The area proposed for annexation has no natural boundaries.

Exhibit M-11 is a plan showing properties in the area proposed for annexation identified by Land Registration and Information Service (LRIS) property numbers. Mr. Delorey prepared it by superimposing the property mapping information on his original plan. It is dated June 1, 1985, with revisions dated June 23, 1986.

Mr. Wallace MacIsaac, an assessor with the Antigonish-Guysborough assessment region, whose office is in the community of Guysborough, is responsible for the assessments in Municipal Districts 1-5 located in the northern part of Guysborough. The area proposed for annexation is in District 3. Mr. MacIsaac verified the information on Exhibit M-12 which was prepared at the regional assessment office using Exhibit M-11 as a guide together with LRIS information. Exhibit M-12 is a five-page chart showing the assessment of each property in the proposed annexation area and its classification.

Mr. MacIsaac noted that the majority of properties in the area were classified as Resource or Residential because the land use in the area is primarily forestry and small farming. A sawmill assessed at $6,100.00 and its equipment assessed at $1,500.00 is the only commercial operation in the area. A clubhouse in Mattie Settlement is the only other property classified as commercial. It is assessed at $7,500.00. Mr. MacIsaac said that an average price of a residential lot in the area was approximately $3,500.00 and that most of the forest acreage was owned by non-residents. He believed that it was "likely" that there were 14 non-resident property owners in the area as stated by Mr. Carter. There were a "fair number" of older residential properties in the area he said, and "7 or 8" mobile homes.

As set out in Exhibit M-12, the total 1986 assessment of the area proposed for annexation is $1,264,900.00 of which $945,600.00 is residential property and $13,600.00 is commercial property.

Robert French, a chartered accountant and partner in the firm of Thorne, Ernst & Whinney (formerly Thorne Riddell) explained the report entitled "Mattie Settlement - Grosvenor Area Ratepayers' Petition, Analysis of Financial Impact" (Exhibit M-18) prepared by his firm and for which he was directly responsible. Mr. French who works in his firm's Sydney office has audited cities, towns, villages and district school boards and is familiar with both municipal and school board financing. Mr. French's report analyzes the financial implications of the proposed annexation for both municipal units, their district school boards, the ratepayers in Antigonish, the Applicant ratepayers in Guysborough, and all other ratepayers in Guysborough.

Mr. French stated that the main impact of the proposed annexation would be in the area of taxation. His report sets out the following conclusion:

> " The financial impact of the ratepayers' petition is not considered significant to Guysborough or Antigonish Counties whether measured in total dollars or on a rate per hundred dollars of assessment. The net

> annual financial cost to Guysborough County is $14,830 or six tenths of one cent per $100 of uniform assessment. The savings to Antigonish County is $9,815 or three tenths of one cent per $100 of uniform assessment."

His report projected the effect on each major revenue and expense category itemized in the financial statements of both Antigonish and Guysborough for the year ending December 31, 1985. Levels of Municipal services currently available were noted and the assumption was made that those levels would not change.

Based on the taxable assessment of the area proposed for annexation, Guysborough would lose $14,020.00 in tax revenue if the annexation application were improved. Additionally, Mr. French calculated that $200.00 would be lost annually in interest revenue on unpaid taxes and the provincial operating grant would be reduced by $3,100.00 a year because of the loss of 46 residential units.

Offsetting this projected total revenue loss to Guysborough of $17,320.00 ($14,020.00 + $200.00 + $3,100.00) were savings on fiscal services of $2,490.00. These savings were composed of an estimated $400.00 saved in the discount on taxes, a $200.00 reduction in the per capita hospital tax and a $1,890.00 reduction in the mandatory municipal contribution to the Guysborough District School Board.

The net financial impact of $14,830.00 ($17,320.00 - $2,490.00) was rounded by Mr. French to $15,000.00 which he estimated to be a cost to Guysborough of $0.006 per $100.00 of uniform assessment. He considered that this was not a significant amount to Guysborough and that it could be retrieved from the remaining Guysborough ratepayers by an increase to the tax rate of 1.3 cents. This increase could be allocated variously to the residential and/or the commercial tax rate as Council saw fit. The residential tax rate in Guysborough was $1.30 in 1986 and the commercial rate for that year was $1.88.

The financial impact of the proposed annexation for Antigonish was projected to be an increase in revenue of $11,775.00, an amount lower than the net effect on Guysborough mainly because of the lower tax rates in Antigonish. The 1986 residential tax rate in Antigonish was $0.94 and the commercial tax rate was $1.25. The additional taxation to Antigonish was estimated to be $10,325.00, the additional interest on unpaid taxes $150.00, and the additional provincial operating grant was estimated to be $1,300.00.

Offsetting these projected increased revenues, Mr. French calculated that there would be additional costs to Antigonish of $308.00 in tax discounts, $200.00 in increased per capita hospital tax and an estimated $1,460.00 increase in the mandatory municipal contribution to the Antigonish District School Board.

The projected increase in expenditure for Antigonish of $1,960.00 ($300.00 + $200.00 + $1,460.00) would reduce the increased revenues of $11,775.00 which Antigonish would experience from the proposed annexation resulting in a net financial impact of $9,815.00 ($11,775.00 - $1,960.00) which Mr. French rounded to $10,000.00. He concluded that Antigonish could expect to experience a $0.003 saving on each $100.00 of uniform assessment if the annexation application were approved.

In cross-examination Mr. French acknowledged that he knew that provincial grants were based on uniform assessment figures obtained from the Department of Municipal Affairs but that the assessment figures used in his calculations were taken directly from the assessment rolls. He said he was unaware of the percentage of uncollected taxes in Guysborough for the year 1985, or whether there had been a tax increase in Guysborough in 1986. He agreed that projected savings by Guysborough in mandatory contributions to the district school board could be offset by a need for greater excess funds from Guysborough for the school board budget. Mr. French said that he was sufficiently familiar with the tax base of Guysborough to know that there was very little high industrial or commercial assessment and that the majority of assessments were Residential or Resource. He had not compared the variance between the Guysborough and Antigonish tax rates and so could not comment on the differential.

Alan Bond, Municipal Clerk-Treasurer for Antigonish for 3½ years, verified a certified copy of a motion by the Municipal Council (Exhibit M-13) which reads as follows:

> "TO WHOM IT MAY CONCERN:
>
> This is to certify that the following is a motion that was moved and seconded by the Antigonish County Municipal Council at their regular monthly meeting held on December 17, 1985
>
> MOVED BY COUNCILLOR HERBERT DELOREY AND SECONDED BY COUNCILLOR ANTHONY MACINNIS THAT ANTIGONISH COUNTY

> AGREES TO PROVIDE THE RESIDENTS OF MATTIE SETTLEMENT AREA WITH THE SERVICES THEY ARE NOT RECEIVING FROM GUYSBOROUGH COUNTY IF THEY ARE SUCCESSFUL IN THEIR APPLICATION TO THE MUNICIPAL BOARD. MOTION CARRIED."

According to Mr. Bond, his office had calculated the costs to Antigonish if the application was successful and determined that they would be insignificant. Students from the Mattie Settlement-Grosvenor already attend Antigonish schools. If the annexation were approved the area would become part of District 8 in the Municipality of the County of Antigonish. In cross-examination Mr. Bond stated that uniform assessment is calculated by the Province and that it differs from total assessment because it omits exempt property.

William MacNeil, Superintendent of Schools in the Antigonish District School Board for the past two years gave evidence on the attendance of students from the Mattie Settlement-Grosvenor area in Antigonish Schools. Students from the area attend Tracadie Consolidated School from grades Primary to 6 and then attend either Antigonish East High School in Monastery or the Regional High School in Antigonish (town) depending on the program they need, with the majority attending the high school in Monastery. Mr. MacNeil said that he understood that there was a 20-year history of students from the area attending Antigonish Schools. Transportation is provided by one bus from Guysborough and two from Antigonish; he anticipated no problems if the area became annexed to Antigonish. Tracadie is approximately 5 miles from Mattie Settlement, Monastery approximately 3 miles and Antigonish (town) approximately 18 miles distant.

Ian Stewart, formerly Superintendent of the Guysborough District School Board until August 1986 when he accepted a position in New Brunswick and moved to Fredericton, gave evidence for Guysborough by agreement with Counsel for the Applicants. Mr. Stewart had been the last Superintendent of the Guysborough Municipal School Board commencing June 1, 1982 and the first Superintendent and Chief Executive Officer for the new District School Board which came into operation in January 1983. The Guysborough District School Board serves the Municipality of the District of Guysborough, the Municipality of the District of St. Mary's and the Towns of Canso and Mulgrave.

In the early days of the new District School Board, it experienced severe financial problems according to Mr. Stewart which led the Board to consider a number of options in order to reduce costs, including the "reclamation" of students from Guysborough then attending schools outside the jurisdiction of the District School Board. At that time, approximately 92 students attended Antigonish schools, for whom the Guysborough Board was charged tuition by the Antigonish Board. Although Guysborough students attended schools in the surrounding municipalities of Halifax County, Pictou, Antigonish and Inverness, only Antigonish charged tuition to educate Guysborough students.

In March 1983, the Guysborough Board passed a motion that staff attempt to renegotiate tuition fees with the Antigonish Board and study the matter of retention of the Mattie Settlement and Grosvenor students within the Guysborough system. Another motion was passed in June 1983 calling for further investigation of the status of the students in this area. In December 1984 the Board in Committee discussed the "reclamation" issue but made no recommendation to the Board. In January 1985 a motion to retain students from Mattie Settlement and Grosvenor within the Guysborough system was put to the full Board and defeated by a vote of 14-1. Mr. Stewart stated that this matter was not considered by the Board or committees of the Board at any other time. He believed that the community opposition in Mattie Settlement and Grosvenor to the proposed "reclamation" of their students had influenced the members of the Board to consider both the history of school attendance of students from that area and the practical considerations raised by members of those communities.

In cross-examination Mr. Stewart agreed that the projected decrease of $1,890.00 in the mandatory assessment to be paid to the School Board by Guysborough if annexation were approved, would represent a comparatively small proportion of the District Board's annual budget of approximately $10 million. He felt that such a reduction in mandatory assessment would however need to be replaced by an equal amount in excess funding, and the sharing formula for municipal units served by the Board gives Guysborough veto power over amounts of excess funding.

The two staff reports by respectively, the District Board's Assistant Superintendent and Chief Financial Officer of the day, filed as Exhibits M-22 and M-23, dealing with "Program Implications, Border Area Students" and "Background Data on Students Attending Schools in Antigonish County" were not recognized by Mr. Stewart as Board or Committee documents. He concluded that they may have been preliminary working papers prepared prior to the Board's decision to continue to study the matter of "reclamation" in June 1983.

Mr. Stewart acknowledged that the document entitled "Guysborough County District School Board, Aims for 1983-84" filed as Exhibit M-24 and approved by the Board in 1983 contains Aim 2.2.1: "to establish a plan for the retrieval of students attending schools in the Antigonish County District". He commented however that a percentage of such objectives were always considered unworkable with no action taken at each year end.

Mr. Stewart agreed that the steady decline in the student population in Guysborough could continue, producing increased pressure on Board members for fiscal restraint. He agreed that current or future Boards could decide to cut students' historical school ties as had been done in the case of students from Auld's Cove who were reclaimed into the Guysborough system, however "they might not be able to get away with it". Mr. Stewart believed that the Board had allowed the issue to die because it believed that further reclamation of students might not be possible. In conclusion, Mr. Stewart said that in his opinion annexation would guarantee that the students from Mattie Settlement and Grosvenor would be able to attend Antigonish schools, and if the proposed annexation did not take place there was a "good probability" that they would continue to attend Antigonish schools.

The four members of a community committee who had initially investigated the schooling issue and ultimately pursued annexation for the communities of Mattie Settlement and Grosvenor - Wayne Carter, Raymond Decoste, Myles Sumers and Father Frank Morley - all gave evidence individually. An existing organization, the Mattie-Grosvenor Planning Association, incorporated in 1977,"took on" the annexation in 1984.

Wayne Carter kept a journal (Exhibit M-15) in which he recorded meetings with area residents, with school board officials and with local politicians, commencing March 8, 1983 and concluding July 2, 1986. Although the concern about the school destination for students in the area led to the annexation application, Mr. Carter said that the social connections with communities in Antigonish would be enough reason to continue to pursue annexation even if parents received a "guarantee" that their children would not be reclaimed into the Guysborough school system. In his attendance at meetings and in visiting local homes, Mr. Carter could not recall any opposition being expressed to annexation. He considered that school, sports and social activities for all ages were all oriented to Antigonish rather than Guysborough.

Raymond Decoste, the father of three children in the Antigonish School system, remembered the closing of the Grosvenor School in 1961 and the redirection of students to Guysborough schools until 1966. He believed that annexation was the only means to assure area parents that their children would continue to attend Antigonish Schools. Sports activities for young people, Scouts and Guides and continuing education classes all take place in Antigonish he said. Mr. Decoste summarized the situation this way: "Everything we do in our everyday life, including everything our children do, is based in Antigonish County."

Father Frank Morley has been parish priest of St. Peter's Parish, Tracadie, for 10 years. Parish boundaries cross municipal boundaries and the area proposed for annexation is within St. Peter's Parish. Father Morley was first approached about the school "reclamation" issue by Wayne Carter who was frustrated by rumours of such a move and lack of clarification. Father Morley then established for himself that the issue was a genuine concern for both adults and children in the communities of Mattie Settlement and Grosvenor. Most families in the area are members of his parish and he is acquainted with them all. Father Morley reviewed and confirmed the meetings chronicled by Mr. Carter, initially about school reclamation, and subsequently on the matter of the application for annexation.

Father Morley made it clear that he got involved initially to help allay peoples' anxiety about the school situation but "as time went by" he realized that the people of Mattie

Settlement and Grosvenor were "an integral part of the cultural life of the Tracadie area". He understood that annexation would not change that, but he felt that it would relieve the anxiety about "reclamation" which could make the children's links with the Antigonish communities much more difficult. He believed that the difference in the tax rates of Guysborough and Antigonish were not an issue ("it didn't enter their mind"), and non-parents were equally concerned because they saw the school issue as a social issue affecting everyone.

In cross-examination, Father Morley said he had concluded that the current Guysborough-Antigonish boundary, which be considered to be a geographical and historical anomaly, may have originated when the principal connections of the Mattie Settlement-Grosvenor area were with Mulgrave, but over time links had strengthened instead with the Tracadie area. He acknowledged that if annexation was not approved no parish activities would be cut. He stated that he had not inquired about alternatives to annexation although he knew that the Guysborough District School Board had defeated "reclamation", because he felt that the Board's direction was not clear, that there were "mixed signals" from the Board, and that a future Board might decide the matter differently.

Myles Somers who lives in Grosvenor is the father of 5 chidren all of whom have been or are being educated in the Antigonish School system. He is the Chief of the Tracadie and District Volunteer Fire Department which serves a territory identical to the boundaries of St. Peter's Parish and so includes the communities of Mattie Settlement and Grosvenor.

Mr. Somers was the committee member responsible for canvassing Grosvenor on the issue of annexation. He corroborated the series of meetings with local politicians, school board members and area ratepayers as set out in Wayne Carter's journal. The public meeting of April 29, 1984 called to consider the school issue and possible annexation had included ratepayers from the community of Merland located west of Mattie Settlement along the Guysborough-Antigonish boundary. Since only 3 of the families in Merland live on the Guysborough side of the line and since it was considered quite unfeasible for Guysborough to attempt to reclaim any students from that area, the ratepayers from Merland agreed to their exclusion from the area proposed for annexation.

In Mr. Somers' opinion, annexation was justified for social reasons since residents of Mattie Settlement and Grosvenor were so involved in activities centered in Antigonish and therefore should be a part of that municipal unit. A "real gain" from annexation would be "school certainty".

Four further witnesses on behalf of the applicants - Dennis Decoste, Teresa Mattie, Laura Romans and Herbert Delorey - all supported the annexation application for both the educational and social reasons stated by others. Mr. Dennis Decoste (father of Raymond) has lived in Mattie Settlement for 50 of his 74 years and was "almost continuously" School Trustee and Secretary from 1940 until the closing of the Grosvenor School. He said that while there had once been more contacts between the area of Mattie Settlement and Grosvenor with

Guysborough, "the economics have changed" and all the employment was now in Antigonish.

Teresa Mattie, Secretary-Treasurer for the Mattie-Grosvenor Planning Association, President of the Ladies Auxiliary of the Tracadie and District Volunteer Fire Department, President of the Tracadie Council of the Catholic Women's League, Member of the Board of the Havre Boucher Medical Centre, said that the only Guysborough-based organization to which she belonged was the local Planning Association. That group had set about fundraising in 1983 to pay for the costs of the annexation application through dances, bingos and card games, resulting in a total of approximately $7,000.00 being collected through widespread community support.

Laura Romans, mother of 3, one of whom attends Antigonish schools believes that children make friends where they go to school and that transportation to and from Guysborough (20 miles each way) would be too much for parents to manage so that their children could participate in extra-curricular activities. She felt that as long as the taxes from Mattie Settlement and Grosvenor were paid to Guysborough, that municipal unit could influence where area children attended school. She believed that most families could not themselves pay the tuition necessary to allow their children to continue to attend Antigonish Schools if Guysborough reclaimed them into its school System.

Herbert Delorey, Councillor for District 8, Antigonish - the district which could encompass the area proposed for annexation, said that he had been aware from the beginning of the school concerns which led to the annexation application. He felt that there would be no difficulties if annexation were approved. He agreed that the community of Merland had been excluded from the proposed annexation because its inclusion would take a large amount of land from Guysborough but benefit only 3 families. He understood that the boundaries for the proposed annexation area had been chosen primarily to include all homes in the communities concerned.

Robert French, responsible for production of Exhibit M-18, the analysis of the financial impact of the proposed annexation, was recalled and modified his earlier evidence. In the interval he had reconsidered the matter of uniform assessment vs taxable assessment raised in cross-examination by Counsel for Guysborough. He stated that he had believed that the assessment figures used in Schedules "C" and "D" of Exhibit M-18, which schedules showed calculations of amended mandatory assessments for the Guysborough and Antigonish school boards respectively, were uniform assessment figures as had been requested by him in the preparation of his report. He had since understood that the "uniform assessment" figures used in his calculations were wrong. Uniform assessment is calculated by the Department of Municipal Affairs, he stated, and uniform assessment figures are higher than taxable assessment figures because in addition to the total assessment, the Department adds the capitalized values of grants in lieu of taxes in computing uniform assessment.

Mr. French had confirmed the uniform assessment figures with the Department in the interval following his original evidence, and recomputed the figures set out in Schedules "A", "C" and "D" from his original report, Exhibit M-18.

Exhibit M-25(b) which is a revision of the original Schedules "C" and "D" shows that the uniform assessment total for all municipal units contributing to the Guysborough District School Board was not $250,355,144.00 but $182,132,439.00. Similarly the uniform assessment total for all Municipal units contributing to the Antigonish District School Board was not $408,273,207.00 but $303,624,600.00. These changes resulted in a decrease in Guysborough's mandatory contribution for the Guysborough District Board of not $1,890.00 but $4,387.00 and an increase in the Antigonish mandatory contribution for the Antigonish District Board of not $1,460.00 but $4,477.00.

These revised figures result in an estimated net annual financial loss to Guysborough of $12,300.00 (rounded) instead of $15,000.00, and an estimated net annual financial gain to Antigonish of $6,800.00 (rounded) instead of $10,000.00. The cost per $100 of uniform assessment to Guysborough became $.007 (formerly $.006), and the savings/advantage to Antigonish if the annexation application were approved became $.002 (formerly $.003). Mr. French pointed out that the revised calculations showed a less significant impact on both municipal units.

Jack Sullivan, Assistant Superintendant with the Guysborough District School Board since August 1986 gave evidence for Guysborough on the matter of student "reclamation" as it affected the finances and operations of the Board. Mr. Sullivan confirmed that Exhibit M-20, a report on the financial and other implications for the Board of the proposed annexation, had been prepared by its research and communications officer since the superintendent and assistant superintendent of the day were unavailable at the time.

Mr. Sullivan said that border area Guysborough students in Ecum Secum attended schools in Halifax County and students in Goshen attended Antigonish schools, but that their "reclamation" had not been considered by the Board. The "reclamation" aim for students from Mattie Settlement and Grosvenor, set out in the Board's annual statement of aims was deleted after the 83-84 school year and had never reappeared.

Mr. Sullivan stated that funding for the Guysborough Board was very difficult because of the relative poverty of the municipal units served by it, most of which needed additional financial assistance from the Province annually. He said that the Board has requested and received excess funding every year since it commenced operations but nevertheless had to close schools and lay off teachers.

In cross-examination, Mr. Sullivan said that once tuition payments were no longer required by the Antigonish Board, the "reclamation" issue had been dropped, and he felt that it would be highly unlikely to resurface. He agreed that the per capita grants from the province means that more students produce more grant income and that this was one factor in favor of "reclamation"

Mr. Sullivan agreed that a $4,387.00 impact in a school board budget of approximately $10 million was not significant. In his opinion the precedent of a successful annexation application could have a significant impact for the Board "down the road" and would affect the quality of education able to be offered in the balance of Guysborough. He agreed that the precedent was his worst anxiety.

Cheryl Tynski, Municipal Clerk-Treasurer for Guysborough for 7 years, gave evidence on the financial and social implications of the proposed annexation to her Municipality. Ms. Tynski said that the first notification which the Municipality had of the intentions of the residents of Mattie Settlement and Grosvenor to pursue annexation to Antigonish was through a letter from Rev. Frank Morley to Warden Valerie Rhynold of Guysborough dated October 30, 1984 (Exhibit M-26), to which she replied on behalf of the Warden on November 19, 1984. Ms. Tynski prepared Exhibit M-19, a report on the financial and other implications to the Municipality of the District of Guysborough of the proposed annexation as it would affect assessment, per capita funding, cost of services and the social impact, as follows:

> "LOSS OF ASSESSMENT
>
> a) Effect on tax rate
>
> Total assessment value in the area proposed for annexation appears to be $1,264,900.00 (1986 figures). This represents approximately 1.68% of the total assessment in the Municipality of the District of Guysborough. Deleting this amount from the tax base of the Municipality of the District of Guysborough will mean that tax rates for the remainder

of the Municipality will increase. Using 1986 budget figures, an increase of two cents (.02¢) on the residential tax rate would be required to collect the same tax levy, if Mattie and Grosvenor were deleted. While this may not appear to be a great amount, even a small increase in taxes is most unwelcome for the average tax payer. Many ratepayers in the District of Guysborough are on fixed incomes, many are unemployed, and opportunities for employment are very scarce. Consequently, even a small increase in the tax rate is felt as a significant burden.

(b) Cost sharing

Many services today are provided by municipalities through conditional transfers from the Provincial government. Such cost shared programs, as they are commonly called, often rely on assessment values as a basis for sharing formulae. In fact, the general (unconditional) operating and capital grants provided to municipalities through the Department of Municipal Affairs are based on a formula which uses uniform assessment to determine grant entitlements for municipalities. The loss of the assessment value for the Mattie and Grosvenor areas will therefore mean that the general operating and capital grants paid to the Municipality of the District of Guysborough will decrease.

Municipalities also receive a grant based on the amount of forest acreage within the Municipality. This grant will also be decreased if the Mattie and Grosvenor areas are removed from the Municipality of the District of Guysborough.

The financial impact of the proposed annexation on School Board funding will be dealt with separately by School Board officials. It should be noted here, however, that the mandatory municipal contribution to the School Board is based on uniform assessment. A decrease in uniform assessment will therefore mean a decrease in the mandatory municipal contribution to the School Board. As the Guysborough County District School Board is already facing serious financial problems, this decrease in funding is sure to lead to even greater financial challenges.

PER CAPITA FUNDING

Services which are cost shared on a per capita basis will also experience a decrease in funding. Although population data for the Mattie-Grosvenor area has not been provided, we would estimate that at least two hundred people will be affected. Provincial funding for libraries, for example, will therefore also decline.

COST OF SERVICES

Some might make the argument that the cost of services will decrease when services are provided to fewer people, or to a smaller territory. It is not anticipated that any cost savings will result from deleting the Mattie-Grosvenor area from the Municipality of the District of Guysborough. Most services (ie, Justice, Recreation, General Government, Environmental Development, Education) have more or less fixed overhead costs which are not significantly affected by small variations in the population served. In the case of Social Services programs, which constitute the largest expenditure category, costs may vary as a result of changes in caseload. However, the caseload will not necessarily decrease if a particular area is deleted. In the case of the garbage collection service, one might anticipate that a shorter route will lead to lower travel costs. However, it is not expected that deleting the Mattie-Grosvenor area would have any significant affect on the cost of the garbage collection service. The costs of garbage disposal (ie, maintenance of the landfill site) are expected to remain the same. A complete breakdown of the cost of services provided by the Municipality of the District of Guysborough is shown in TABLE L.

TABLE 1
The Municipality of the District of Guysborough
1986 Budget Estimates - Summary

EXPENDITURE CATEGORY	COST	PERCENT OF TOTAL
Social Services	$1,039,000.	30.8%
Fiscal Services	1,023,186.	30.4
Education	521,472.	15.5
General Administration	275,836.	8.1
Justice	181,000.	5.4
Garbage Service	174,000.	5.2
Fire Protection & Animal Control	89,972.)	4.6
Recreation	47,965.)	
Transportation	18,400.)	
TOTAL	$3,370,831.	100.%

SOCIAL IMPACT

Most of the matters listed by the ratepayers of the Mattie-Grosvenor areas as grounds for their application (Section 3(a) are in fact social considerations. The Municipality of the District of Guysborough maintains that these features are typical of any border region and have no bearing on municipal services. In fact, the vast majority of the population of the Municipality of the District of Guysborough do much of their shopping in Antigonish and virtually all children born to Guysborough residents are born at St. Martha's Hospital in Antigonish. Any residents of the Municipality of the District of Guysborough are also free to make the choice to receive legal, medical or other professional services from Antigonish. However, most of these services are available in the Municipality of the District of Guysborough. We do not feel that these matters constitute reasons for changing municipal boundaries.

Most municipal boundaries in Nova Scotia, particularly county boundaries, have been in place for more than one hundred years. It is our contention that these boundaries should not be tampered with unless overwhelming reasons exist to justify a change.

The Mattie-Grosvenor area is a part of the Municipality of the District of Guysborough and shares a community of interest with others in the Municipality. The Municipality is made up of a wide variety of people and it cannot be denied that characteristics and interests do vary from one community to another. Residents of Little Dover, for instance, have their own special characteristics which are different from those of Larry's River or Guysborough Village or Country Harbour or New Harbour. We recognize and appreciate the special qualities of the residents of the Mattie-Grosvenor areas and we believe that it is this diversity which adds to the quality of life in the Municipality.

SUMMARY

The loss of the Mattie-Grosvenor areas will have a negative affect on the Municipality of the District of Guysborough as a whole and on the individual ratepayers within the Municipality. Ratepayers can be expected to be subjected to an increase in taxes in order to maintain

> services at existing levels. Besides decreasing the tax base, the annexation can be expected to cause a decrease in other sources of funding while the costs of services increase or remain the same. The change in municipal boundaries will also be detrimental to the social fabric of Guysborough Municipality and it appears unlikely that the ratepayers in the annexed area will experience any significant advantages as a result of a change in boudaries."

In commenting on her report, Ms. Tynski said that the tax base in Guysborough was not strong and that there were few industries within the Municipality and consequently a very low level of commercial assessment. In 1985 she stated that 24% of the taxes levied in that year had been uncollected because of the depressed state of the area economy and the very few employment opportunities.

Ms. Tynski concluded that the financial effect of the proposed annexation would be a loss to the Municipality of approximately $12,000.00 in tax revenue which would result in a $.02 increase in the residential tax rate. The tax rate in Guysborough had gone up by $.05 in 1985 and previously in 1983 by an unstated amount. Ms.Tynski believed that any reduction in the mandatory contribution for the school board as a result of the annexation of the Mattie Settlement - Grosvenor area would be offset in her opinion by an identical increase in the school board's requested excess funding. She pointed out that there had always been excess funding requests from the District Board since its inception, although these requests had not always been fully approved by Guysborough. She said that she believed that Council considered excess funding "inevitable" and a "necessary evil" but expected the school board to justify the excess funds requested.

Ms. Tynski expressed reservations about some of the figures in Exhibit M-18 and Exhibits M-25 (a) and (b), the analysis of the potential financial impact of the proposed annexation prepared by Mr. French, with revisions. She pointed out that the amounts of uniform assessment of the Mattie Settlement - Grosvenor area used in Schedule "C" of Mr. French's original report - $1,264,900.00 - which agreed with the assessor's total assessment for the area, was more than the amount of uniform assessment for the area used in the revised Schedule C ($1,070,038.00), even though Mr. French had given evidence that uniform assessment figures were always higher than either total assessment or taxable assessment. Ms. Tynski said that she was not aware of the uniform assessment figures for the current year for Guysborough, and was not sure how Mr. French had acquired them or whether they were correct.

In conclusion she said that while a possible increase of $.04 on the residential tax rate was not large in itself, taxpayers in Guysborough had a hard time paying taxes at the existing rate and any increase (which could be compounded by inflationary increases as well) would be "painful" for them. The Guysborough Council accordingly had decided to oppose the annexation application at the hearing.

Commenting on the grounds of the application submitted as part of Exhibit M-8, Ms. Tynski said (1) that it was not unusual that the applicants stated that they were "born in the County of Antigonish", since almost all babies born to Guysborough residents, except for emergency deliveries, are born in St. Martha's Hospital in Antigonish. That the Applicants were baptized, go to Church and are "Laid to Rest" in Antigonish she said, was a matter of church affiliation and parish boundaries. The banking and shopping which the applicants stated they did in the Town of Antigonish was a matter of personal choice she felt, since both could be done as well in the community of Guysborough. Medical, legal and other professional services in the Town of Antigonish used by the applicants were also a matter of individual choice, with alternatives available in the community of Guysborough. Fire protection from the Monastery Volunteer Fire Department in Antigonish and postal services centered in Antigonish were situations not uncommon in border areas of Guysborough Ms. Tynski stated.

In cross-examination, Ms. Tynski stated that $.02 of her projected $.04 increase in tax rate was due to loss of assessment and the remaining $.02 was an estimate of the effect of necessary excess school board funding and a diminished provincial operating grant. She said she had not considered or estimated additions to the commercial tax rate instead of, or in addition to, additions to the residential tax rate. She agreed that the total estimated financial impact of the proposed annexation of $12,300.00 as calculated by Mr. French, looked "reasonably accurate for this component". While she did not agree with Mr. French's figure of $3,100.00 as a projected revenue loss through diminished "unconditional transfers", she had not calculated an alternative figure. She did not question the approach or relevant budget categories used by Mr. French in his financial impact analysis which had not been available to her when she had prepared her report, Exhibit M-19. She disputed the conclusion by Mr. French in the revised figures of Exhibit M-25(a) that Guysborough would experience a loss of $.007 per $100 of uniform assessment because it was "irrelevant", since the tax rate is not based on uniform assessment, and an impact on the tax rate cannot be estimated by the amount of change in the uniform assessment.

Ms. Tynski stated that the financial impact of the proposed annexation could best be determined "after the fact" when the assessor had prepared the roll and the Department of Municipal Affairs had calculated uniform assessment following the approval of this annexation application. She believed that accurate figures on the impact rather than speculation could only be known then. Ms. Tynski agreed that the social institutions in the remainder of Guysborough would not be lessened or dimished by the proposed annexation and she agreed that "in terms of sheer geography" there was a physical and cultural link between the area residents and Antigonish.

Ms. Tynski concluded that there was no necessity for the proposed annexation because she believed that the school concerns which were a major priority of the Applicants had been "laid to rest" by the Guysborough District School Board. She expressed the opinion that an annexation application should not be approved just for expediency, but eventually said that it was her personal observation that the application was not expedient. The financial impact of the proposed annexation she felt was "significant though not large" for the remainder of Guysborough ratepayers other than the Applicants. She felt that the Applicants were requesting annexation more for psychological benefit than for its social implications and that their principal concern was assurance about schooling in the future.

Paul Rand, Chief Financial Officer for the Guysborough District School Board since December 1984, gave evidence on the funding formula for the school board and on the distribution of mandatory contributions and excess funding in the board's budget. He confirmed that the funding formula depends upon enrolment. The per capita grant is currently approximately $2,700.00 per student. The mandatory contribution which must be paid by the Municipal units served by the Board is a levy determined annually by the Province based on uniform assessment. The Board has requested excess funding from the Municipal units in each year of its existence in order to balance its budget even though severe budget-cutting measures have been employed such as the closing of 6 of the Board's 18 schools. Guysborough contributes 53-55% of the excess funding. Each municipal unit served by the Board contributes a share based on a formula set out in the District Board agreement. Mr. Rand did not anticipate that the Board's need for excess funding would level off for "5 or 6 years at least". He stated that in 1985 the Board would have needed to lay off 1/4 of its staff if no excess funding had been approved.

In cross-examination, Mr. Rand agreed that the financial impact of the proposed annexation on the school board was "not material" but nevertheless he emphasized that the Guysborough board faced severe budget difficulties each year and could ill afford to respond to even comparatively small budget changes which he regarded as a precedent.

Following the public hearing on this application, briefs were filed with the Board by Counsel for the Applicants and for the Municipality of the District of Guysborough. Counsel for the Municipality of the County of Antigonish did not file a post-hearing brief; Counsel for Guysborough filed a rebuttal brief.

The Board notes that the Minister of Municipal Affairs is a party to any application before the Board, pursuant to Section 27 1(b) of the Municipal Board Act. Although notified of the commencement of these proceedings and of the hearing, the Minister did not appear or take part in the hearing.

In coming to a decision on this application, the Board has considered carefully the evidence adduced at the hearing, the arguments contained in the post-hearing briefs, and the factors to be considered by the Board as set out in Section 6 and 22 of the Municipal Boundaries and Representation Act. The Board drove through the area proposed for annexation and nearby communities.

The sections of the Act relevant to a decision on this application made pursuant to Section 20(1)(b) are the following:

> "Section 6 Upon an application to the Board, the Board shall inquire into and take into account the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

> "Section 22(1) The hearing of the application shall be in accordance with the Municipal Board Act and the Board may, if satisfied that the order is in the best interests of the inhabitants of the area, taking into consideration the financial and social implications of the order applied for, grant the order of amalgamation or annexation."

This application is the first to be considered under the wider range of factors set out in the current Municipal Boundaries and Representation Act which came into force October 1, 1985. Section 6 quoted above is virtually identical to Section 8 of the former Municipal Boundaries and Representation Act, R.S.N.S. 1967, Chapter 195. The "new" factors to be considered by the Board are contained in Section 22(1) - "the best interests of the inhabitants of the area" and the "social implications" of the annexation application.

The factors, then, against which the Board must measure the application are the following (in no priority order);

1. **Necessity**
2. **Expediency**
3. **The financial position of the municipality affected**
4. **The financial obligations of the municipalities affected**

5. The burden of taxation upon the ratepayers
6. The best interests of the inhabitants of the area
7. The social implications of the order applied for
8. All other relevant matters

Counsel for the Applicants argues that there is a necessity for annexation if the term is interpreted as a "need" by the ratepayers and inhabitants of the area proposed for annexation for one of the municipalities more than the other. Supporting this he cites an exerpt found on Page 419 of the Board's decision on an annexation application by the Town of Shelburne, (Municipal Board Decisions, Vol. 2/1983) which is in turn quoting a 1954 decision of the Ontario Municipal Board on an annexation application by the City of Brantford as follows:

> "The vital question is not whether one municipality or the other has a greater 'need' of the area in question but more a question whether the area needs one of the municipalities more than the other."

Counsel for Guysborough argued that annexation is not necessary because the Applicants' original concern about the possibility of their children having to attend Guysborough rather than Antigonish schools has been proven unfounded, or even if in future such a move occurred this would not necessitate annexation because the offerings of both school systems were essentially comparable. Secondly the distance that children of the area would have to travel if they were to return to Guysborough schools was no different from the distances other children in rural areas had to travel to school and did not constitute necessity. Thirdly, the anxiety by the Applicants that their children might in future be excluded from school extra-curricular activities or from organization such as Scouts, Clubs, Brownies and Guides, or Minor Hockey and other team sports, if they were not residents of Antigonish but simply students in Antigonish schools, was an unfounded fear not supported by any evidence and so did not constitute necessity. And fourthly, the social orientation of the residents of the Mattie Settlement-Grosvenor area towards the Tracadie area was based primarily on parish-centered activities which would not be altered by annexation and which did not necessitate annexation.

The Board is of the opinion that a case for the necessity for this Annexation has not been made by the Applicants.

Counsel for the Applicants argued that the annexation is expedient because it would remove the possibility of area children being reclaimed into the Guysborough school system, because Antigonish was willing and able to supply municipal services to the area and the Antigonish District School Board could accommodate and transport area students, and because there were strong social, religious and commercial ties between the area and nearby communities in Antigonish but virtually no ties to other Guysborough communities or loyalty to Guysborough as a municipal unit.

Counsel for Guysborough argued that expediency should be construed as a "present expediency" or a "present reason" for annexation, which she said did not exist since there was no imminent threat of student reclamation or future plans to remove area students from Antigonish schools, and since the Applicants had not shown "a greater need for" Antigonish than for Guysborough.

The Board accepts the argument that the Applicants have proven expediency as it relates to their concerns about schooling and the ability of both adults and children to continue to participate in activities located in Antigonish. Financial expediency for the Applicants, often a prime motivating concern in annexation applications, appeared to be of no significant importance to these applicants, although they would benefit financially from the lower tax rate in Antigonish. The Board believes that the strong social and religious affinity of the residents of the Mattie Settlement-Grosvenor area to the nearby communities and institutions in Antigonish, together with their genuine longstanding concern that the children of the area should continue to attend schools in Antigonish makes annexation expedient for these applicants.

Counsel for the Applicants argued that the financial position of (both) municipalities would not be affected in any significant way by the proposed annexation. Counsel for Guysborough contended that the low assessment base in the municipality and its poor tax collection history meant that the difficult financial position of Guysborough would be adversely affected by approval of this annexation application.

Counsel for the Applicants argued that the financial obligations of the municipalities would not be significantly affected since the net impact on Guysborough would be a loss of $12,300.00 and the net effect on Antigonish would be a gain of $6,800.00. The net loss of $4,387.00 to Guysborough District School Board would not automatically result in a request from the Board for a similar amount in excess funding, or if it did, such an amount would be shared by the four municipal units served by the District Board.

Counsel for Guysborough argued that the financial obligations of Guysborough would be affected by the proposed annexation since the reduction in Guysborough's mandatory contribution to the School Board would result in an obligation by Guysborough to contribute to an equal amount in additional excess funding to the Board.

Counsel for the Applicants argued that an increase of $.013 in both residential and commercial tax rates for Guysborough would be sufficient to compensate for the financial impact of the proposed annexation and would not be a significant burden on Guysborough ratepayers. He observed that there had been no objections filed by Guysborough ratepayers to the annexation application.

Counsel for Guysborough argued that the poor assessment base and poor rate of tax collection in the municipality made even a 1.3¢ tax increase significant, if the projections of the Applicants' expert witness were accepted. She argued that the

Municipal Clerk-Treasurer's projection of a 2¢ to 4¢ tax increase was more likely and that this would indeed be a significantly increased tax burden on Guysborough ratepayers.

The Board appreciates that the proposed annexation would have a positive financial impact on Antigonish and a negative financial impact on Guysborough, and does not dispute the fact that Antigonish may be a municipality in a healthier financial state than Guysborough. The issue to be decided is whether the estimated financial impact of the proposed annexation on the Municipality of the District of Guysborough and therefore ultimately on its ratepayers is significant, and if significant, should be a major determinant in whether or not the annexation application is approved by the Board.

Evidence on the extent of the projected tax increase necessary to compensate Guysborough for the loss of tax revenue from the proposed annexation area indicated that the Clerk-Treasurer of Guysborough believed that a 2¢ increase in the residential rate would be needed. The accountant for the applicants estimated that a 1.3¢ increase on both residential and commercial tax rates would be sufficient. The Clerk-Treasurer for Guysborough believed that there might be a need for an additional 2¢ increase on the residential rate to compensate for the loss of provincial operating grants and increased excess funding for the District School Board but she had not calculated this in detail. In spite of Ms. Tynski's disagreement with many of Mr. French's calculations, she agreed that his estimate of the loss of assessment which would result from the annexation of the Mattie Settlement-Grosvenor area was reasonably accurate.

The Guysborough tax rates in 1985 were $1.30 for residential and resource property and $1.88 for commercial property. According to Ms. Tynski's evidence, the residential tax rate had increased by 5¢ in that year (1985) and increased previously in 1983. In the opinion of the Board the effect on the Guysborough residential tax rate of the proposed annexation would be no more than the increase which took place in 1985 and could be considerably less, depending on how Council decided to allocate the impact between the residential and commercial tax rates.

Counsel for the Applicants argued that that annexation is in the best interests of the inhabitants of the area for which annexation is proposed, as was stated in evidence by a cross section of the Applicants and was not refuted by anyone from the area opposed to the application. Counsel for Guysborough argued that the Applicants believed that annexation was in their best interests because it would confirm that the children of the area would attend school in Antigonish, however, the Applicants had received as much assurance from the Guysborough Board as was possible and annexation was not an appropriate remedy for such unfounded fears.

In Skidmore et al v. Village Commissioners of Kingston, a decision of the Board reported at Page 533 of the Municipal Board Decisions, Volume Four B/1985, the Board interpreted the meaning of "the area" in the phrase "the best interests of the inhabitants of the area" as it appears in Section 14A(1) of the Village Service Act, R.S.N.S. 1967, Chapter 329, as amended, which states:

> "14A(1) If it appears to the Board to be in the best interests of the inhabitants of the area, it shall order that the boundaries of the village be more fully described or changed."

Although the Statutes are different, both the Village Service Act and the Municipal Boundaries and Representation Act provide for applications for boundary changes and require the Board to determine whether such an Order is in the best interests of the inhabitants of the area. The Board in the Skidmore decision cited above determined that although the inhabitants of the larger area (in that case the Village of Kingston) would be affected in some way by the loss of a portion of the Village, the inhabitants who would be most directly affected by the boundary change applied for would be the inhabitants of the area proposed to be removed from the Village. Similarly the Board believes that the inhabitants of the area of Mattie Settlement and Grosvenor are the inhabitants whose best interests should be primarily considered by the Board, even though the best interests of the inhabitants of the area proposed for annexation may not be perceived to be identical with the best interests of the remaining inhabitants of Guysborough.

The Board accordingly determines that the best interests of the inhabitants of the area would be satisfied by the proposed annexation since it would secure the continued education of area children in Antigonish schools and realign the municipal boundary to reflect the existing community of interest between the inhabitants of the Mattie Settlement-Grosvenor area and nearby communities in Antigonish.

Counsel for the Applicants argued that the social implications of the proposed annexation would be that the (revised) boundary would "reflect reality" since social ties did not exist between the communities of Mattie Settlement and Grosvenor and the remainder of Guysborough, but rather with communities in Antigonish based on connections through church, school and social and community events. Counsel for Guysborough conceded that there is "great social interaction" between the communities of Mattie Settlement and Grosvenor and Tracadie in particular but that this relationship, based largely on the activities of the Parish of Tracadie, would continue with or without a boundary change.

The Board agrees that the existing social affinity between the area proposed for annexation and the nearby communities in Antigonish would not necessarily be affected if no annexation occurred. Evidence at the hearing of this application however very clearly linked the social connections established by students to the social ties based on church affiliation and on adult educational, athletic and community group involvement. The aim of reinforcing the existing linkages between the Mattie Settlement-Grosvenor area and Antigonish by ensuring that students would continue to attend Antigonish schools was a theme repeated frequently by witnesses from the area. The Board accepts that the existing social affinity of the area proposed for annexation with Antigonish would be solidified by annexation.

The Board has considered carefully the evidence and argument in support of and in opposition to this annexation application. The Board found it significant that the inhabitants of the area proposed for annexation appeared to have a strong sense of community with a tradition of discussion and action on issues judged to be of importance to their area. No evidence opposed to the application was heard from anyone living in the area. No opposition to the proposed annexation was heard from Guysborough residents living outside the Mattie Settlement-Grosvenor area or from elected representatives from Guysborough. No resolutions by the Council of the Municipality of the District of Guysborough expressing opposition to the annexation were introduced as evidence. While this apparent lack of opposition by concerned citizens or individual elected representatives of Guysborough is not a major determinant in the Board's final decision, it does somewhat offset the evidence adduced on behalf of Guysborough concerning the negative financial consequences of the proposed annexation.

Counsel for Guysborough quotes with approval in her post hearing brief from the Board's decision on an application by the Town of Bridgewater to annex a certain portion of land within the Municipality of the District of Lunenburg (Municipal Board Decisions, Volume 3-B/1984 at Page 27) as follows:

> " The question of alteration of municipal boundaries, even for the comparatively small area in this application, is an issue which affects the interests not only of the property owners of the area involved, but of the citizens present and future of their respective municipal units. Because a degree of certainty about territorial jurisdiction is preferable for all municipal operations, the Board considers that annexation applications should not be lightly undertaken."

In this application the residents of Mattie Settlement and Grosvenor were clearly seeking "a degree of certainty about territorial jurisdiction" as it affected the schools which students in the area would attend. While the evidence adduced at the hearing indicated that there was no present interest or intention by the Guysborough District School Board to reclaim area students into the Guysborough system, reclamation had been seriously considered by the Board before and the Applicants desired more certainty on this matter. Given the persuasive evidence from the Applicants on the essential interconnections between the institutions of the school, church and community organizations and the strong desire by the Mattie Settlement and Grosvenor residents to solidify and ratify those links, the Board cannot conclude that this application for annexation was lightly undertaken or its success a matter of indifference to the Applicants.

The Municipal Clerk-Treasurer for Guysborough expressed the belief that it was not uncommon for "border areas" in a rural municipality to have physical and cultural links to communities in the adjacent municipal unit but that this situation did not justify annexation. With respect the Board believes that few border areas would have such a cohesive sense of community and such a determination to ensure that municipal boundaries complement the community's orientation to schools, church and other institutions and facilities considered by the residents of Mattie Settlement and Grosvenor to be vital to the social fabric of their lives.

The Board is satisfied that the annexation applied for is in the best interests of the inhabitants of Mattie Settlement and Grosvenor, after considering the financial and social implications of the requested annexation. Accordingly, an Order will issue granting the annexation requested by ratepayers of the area of Mattie Settlement and Grosvenor to annex the area of land within the Municipality of the District of Guysborough as described in Schedule "A" to the application, and as shown on Schedule "B" to the application, to the Municipality of the County of Antigonish. The area so annexed will become part of Polling District 8 in the Municipality of the County of Antigonish and be removed from Polling District 3 of the Municipality of the District of Guysborough effective as of January 1, 1988.

The Board is empowered to order costs by Section 22 of the Municipal Board Act "except in respect of a proceeding pursuant to the Planning aCt". None of the parties at the hearing requested costs. The Board exercises its discretion and will award no costs.

DATED at HALIFAX, Nova Scotia, this 12th day of June, A.D., 1987.

E A Salton

ELIZABETH SALTON
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Town of New Waterford v. County of Cape Breton

MUNICIPAL BOUNDARIES—ANNEXATION—APPLICATION BY TOWN TO ANNEX 1300 ACRES FROM COUNTY—WHETHER FACTORS IN SS. 6 AND 22 SATISFIED—DIRE FINANCIAL CIRCUMSTANCES FOR THE TOWN—ASSESSMENT ACT, S. 64—MUNICIPAL BOARD ACT, SS. 22, 27(1)(d)—MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, SS. 6, 7, 8, 9, 10, 11, 17, 20, 22, 44

This is an application by the Town of New Waterford to annex approx. 1300 acres adjoining its eastern boundary from the Municipality of the County of Cape Breton. The Town submitted, inter alia, that the area was needed for industrial growth, that the Town was prepared to extend all municipal services reasonably required within the area and that it had a dire financial need for the area as it was facing imminent bankruptcy. The vast majority of the 1300 acres proposed for annexation is owned by the Cape Breton Development Corporation (DEVCO) or the Nova Scotia Power Corporation.

HELD: The Board approves the annexation by the Town of the lands of the Cape Breton Development Corporation and of those lands in private ownership located within the boundaries proposed. The Town must pay compensating grants to the County and to owners of residential and resource properties. The Board awards to the County as costs the disbursements for its expert witness.

The Board is required to consider with respect to annexation applications the factors set out in ss.6 and 22(1) of the Municipal Boundaries and Representation Act. Of the grounds for the application submitted by the Town, only two have relevance to the factors the Board must consider. Those are that the Town is prepared to extend all municipal services reasonably required or feasible in the subject area and that the Town presently lacks industrial assessment and the subject area would provide the Town with an industrial base. A primary responsibility lies with the applicant Town to adduce evidence to justify the necessity or expediency of the annexation and to adequately set out the financial position and obligations of the municipalities affected and the burden of taxation on the ratepayers. The Board however has the responsibility to weigh the evidence of all parties and to consider it in light of those factors contained in s.6 (necessity or expediency, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and other relevant matters) and additionally to satisfy itself that the order is in the best interests of the inhabitants of the area, taking into consideration the financial and social implications of the proposed annexation (s.22). The burden of justifying an annexation is not a unilateral responsibility. The proposed annexation is expedient for the Town, given its financial state and obligations. No doubt the outcome of this application will have an impact on all the municipal units in the industrial Cape Breton area, and for that reason the absence before the Board of players with a major financial role such

as DEVCO and the Province was unfortunate. Notwithstanding unknowns, the Board has concluded that annexation is justified, although for a more limited area than that for which the Town applied. The financial impact of a refusal on the Town is disproportionately high compared to the impact of an approval on the County. Approval of the annexation will have an effect on the ratepayers in the subject area. The Board believes the ratepayers affected deserve some cushioning from the financial impact and so the Board will order a mechanism to phase in the tax increase that will result. The lands of the Nova Scotia Power Corporation are excluded as there is little likelihood they will generate tax income. The Town will also pay compensating grants to stabilize the area rate levied in District 5 of the County. The social implications of the annexation are beneficial to the inhabitants of the surrounding area as well as of the Town.

The Municipality of Cape Breton applied for Leave to Appeal to the Nova Scotia Supreme Court, Appeal Division. Leave was refused. Subsequently the Municipality made an application to the Nova Scotia Supreme Court, Trial Division for an Order in the nature of certiorari. The application was dismissed.

NSMB-17-86-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, S.N.S., 1982, Chapter 10;

- and -

IN THE MATTER OF: An Application by the Town of New Waterford to annex an area of approximately 1300 acres adjoining the eastern boundary of the Town presently within the Municipality of the County of Cape Breton.

BEFORE: ELIZABETH SALTON, Member

COUNSEL: PETER J.E. MCDONOUGH, Q.C., and HARROLD F. JACKSON, Q.C., for the Town of New Waterford

DAVID N. MUISE, LL.B., for the Municipality of the County of Cape Breton.

DECISION

This application for annexation was heard by the Board after due notice, in the Knights of Columbus Hall in New Waterford, December 1 - 4, 1986. The initial application by the Town of New Waterford (the Town) to annex an area of approximately 1,300 acres adjoining the eastern boundary of the Town, presently within the Municipality of the County of Cape Breton (the Municipality) was dated April 15, 1986 and received by the Board April 28, 1986. In response to a request by the Board for an amended application, Counsel for the Town submitted a new application which was dated May 6, 1986 and received by the Board May 13, 1986. The Board determined that the application made pursuant to Section 20 of the Municipal Boundaries and

Representation Act, S.N.S. 1982, Chapter 10, was an application for a preliminary order as set out in Sections 7-11 of the Act. Accordingly a hearing on the application for a Preliminary Order was held on September 25, 1986 in the Knights of Columbus Hall, New Waterford, after due notice.

The Board issued a Preliminary Order (Exhibit N-14) on October 16, 1986 as follows:

"PRELIMINARY ORDER

> The Board having held a hearing on September 25, 1986 in the Knights of Columbus Hall in New Waterford, after due notice, on an application for a Preliminary Order by the Town of New Waterford to annex an area of land approximately 1300 acres in size, presently within the Municipality of the County of Cape Breton, located adjacent to the eastern boundary of the Town, and the Board having heard Counsel representing the Applicant and the Municipality of the County of Cape Breton and having also heard Paul MacEwan, M.L.A., who had filed notice pursuant to Section 9 of the Municipal Boundaries and Representation Act, S.N.S., 1982, Ch. 10;
>
> IT IS HEREBY ORDERED, pursuant to Section 11 of the Municipal Boundaries and Representation Act, S.N.S., 1982, Ch. 10:
>
> 1. That the suggested boundaries of the area proposed to be annexed be those as described in Appendix "B" to the Application and as shown on a plan by John S. Pope and Associates Limited, dated April 4, 1986, accompanying the Application.
>
> 2. That a comprehensive study be undertaken by the Applicant
>
>   (a) to examine the necessity or expediency of the proposed annexation,
>
>   (b) to examine the financial position and obligations of the Town and the burden of taxation on the ratepayers,

(c) to examine the financial and social implication of the proposed annexation for the area proposed to be annexed, and

(d) to examine the financial implications of the proposed annexation on the Town, the Municipality of the County of Cape Breton and the Province.

3. That a study be undertaken by the Municipality of the County of Cape Breton to examine the financial and other implications to the Municipality of the proposed annexation including the financial impact on its ratepayers.

4. That the New Waterford and District Water Commission present evidence on the financial and other implications of the proposed annexation to the Commission, if any, during the hearing of the application.

5. That the Cape Breton Joint Expenditure Board present evidence on the financial and other implications of the proposed annexation to the Joint Expenditure Board, if any, during the hearing of the application.

6. That the Cape Breton District School Board present evidence on the financial and other implications of the proposed annexation to the School Board, if any, during the hearing of the application.

7. That the Cape Breton Development Corporation be entitled and encouraged to present evidence, during the hearing of the application, on the financial and other implications of the proposed annexation, if any, to the Corporation.

8. That the Nova Scotia Power Corporation be entitled and encouraged to present evidence, during the hearing of the application, on the financial and other implications of the proposed annexation, if any, to the corporation.

9. That these studies be filed with the Board on or before November 21, 1986 and be exchanged directly between those charged with the undertaking of such studies on or before the same date.

10. That December 1, 1986 commencing at 10:00 A.M. at the Knights of Columbus Hall, 3236 Plummer Avenue, New Waterford, be the date, time and place for the

> commencement of the public hearing of the application for annexation."

The application by the Town (Exhibit N-1), signed by the Mayor and Town Clerk, was accompanied by a certified copy of a Resolution passed at a special meeting of the Town Council on May 6, 1986 and by a plan showing the area proposed for annexation (Schedule "A") and a metes and bounds description of the area (Schedule "B"). The grounds for the application set out in the application are as follows:

> (a) That the Subject Area is part of the same economic and serviceable area as the Town of New Waterford and should be part of the Town of New Waterford;
>
> (b That the Town of New Waterford is prepared to extend all municipal services reasonably required or feasible within the Subject Area and to control the development of the Subject Area and its relationship to the Town of New Waterford;
>
> (c) That the Town of New Waterford presently lacks industrial assessment and sufficient suitable area for industrial development and the acquisition of the Subject Area would provide the Town of New Waterford with an industrial base and suitable land for future industrial development.
>
> (d) That the Town of New Waterford wishes to have the Subject Area within its boundaries so that the Town of New Waterford shall have within its control the orderly, planned and desired development of the Subject Area.
>
> (e) That existing development and future development within the Subject Area has and will impact upon the environment, infrastructure and economy of the Town of New Waterford and accordingly the Town of New Waterford should have control over the land use and other planning of the Subject Area.
>
> (f) That development in the Subject Area is and will be serviced through the Town of New Waterford water and sewer systems, and accordingly the Town of New Waterford should obtain the tax revenue from such

> development to compensate the Town of New Waterford for the impact on its services and its economy."

Counsel for the Town called 5 witnesses; Counsel for the Municipality called 3. The Chief Financial Officer for the Cape Breton District School Board gave evidence on behalf of the school board. Nine persons gave evidence on their own behalf; two were opposed to the annexation and 7 were supportive of the application. The Minister of Municipal Affairs, a party to the application by virtue of Section 27(1)(d) of the Municipal Board Act, S.N.S., 1981, Chapter 9, was notified of the commencement of proceedings and of the hearing but did not appear or participate in the hearing.

At the beginning of the hearing Counsel for the Town stated that he was authorized to agree to the exclusion of lands in private ownership from the area proposed for annexation if the owners of those lands were opposed to annexation by the Town.

John Samuel Pope, a Nova Scotia Land Surveyor for approximately 34 years, who has worked primarily in the industrial Cape Breton area was accepted as a qualified land-surveyor. He gave evidence on the plan showing lands proposed for annexation (Exhibit N-2) and the description accompanying the application, both of which were prepared by him on April 4, 1986. Following the metes and bounds description Mr. Pope outlined the principle features and the property ownership of the lands proposed for annexation. Beginning at the intersection of the eastern boundary of the Town of New Waterford, the boundary of the area proposed for annexation follows the Town boundary south to within 100 feet of Roaches Road, then northeasterly to the northeastern boundary of the MacLellan Heights subdivision and southeasterly along the boundary of that subdivision, then easterly generally to the County Road, and along the eastern side of the County Road to the Lingan Road and the Laffin Cove Road, then along the rear line of the lots fronting on that road to the sandbar on the shoreline and then northerly and westerly along the high water mark of the Gulf of St. Lawrence to the beginning point.

Included within the area proposed for annexation are lands in private ownership, and lands of the Cape Breton Development Corporation (DEVCO), the Nova Scotia Power Corporation and the Municipality of the County of Cape Breton. Mr. Pope believed that there were 14 homes, 15 mobile homes and 2 travel trailers located on private lands within the proposed annexation area. The occupied, privately owned lands are located principally in the northwest corner of the land proposed for annexation, with the exception of one occupied lot (one of three) located in the northeast area which has frontage on the County Road running generally east and then south through the area proposed for annexation. The majority of the lands in the subject area are owned by Devco or the Nova Scotia Power Corporation and occupied respectively by the Lingan and Phalen mines and the Power Corporation electrical generating plant.

Mr. Pope stated that if the privately owned lands in the northwest corner of the subject area were excluded from the proposed annexation it would result in a "pocket" of land remaining in the County. He said that there was a precedent for such a situation in two residential streets adjoining the boundary of the City of Sydney containing approximately 75 homes. These two streets - Edgewood Drive and Champlain Avenue - are accessible through the City of Sydney and are otherwise surrounded by City lands.

In cross-examination Mr. Pope agreed that he was instructed by the Town to exclude homes on Roaches Road, in the MacLellan Subdivision and in the Lingan Road area in drawing up the boundary of the area proposed for annexation. He conceded that the lots in the northwest corner of the subject area would be "landlocked" from the balance of the County if excluded from the proposed annexation which is not the situation of the Edgewood Drive and Champlain Avenue which are accessed through the City of Sydney but are "physically joined" and contiguous to the Municipality.

Dr. Nathanson, a medical doctor in the Town for 30 years and Mayor of the Town from 1966 to 1976, gave evidence on the Town's social and economic history as contained in his brief, Exhibit N-6. Beginning with the earliest settlement in the area, Dr. Nathanson traced the opening of the coal mines in the area and the community which developed because of them.

In 1907, four mines were opened in quick succession in an area which is now the Town of New Waterford, bringing an influx of workers to live in the area and work in the mines. A vote on incorporation was held in 1913. According to Dr. Nathanson, "The subsequent fortunes of the Town have waxed and waned with those of the coal industry. Some of the years were turbulent with problems due to changes in mine ownership, changing mine unions, the strike of 1925, mine explosions, variations in the demand for coal and World War II".

When Dr. Nathanson was elected Mayor of New Waterford in 1965, "coal mines were being closed, one after the other, all over Cape Breton, and indeed all over Nova Scotia". Dr. Nathanson continued:

> "In the Town of New Waterford, #16 Colliery had already closed in 1962. This left #12 Colliery as the mainstay of the Town's economy until 1973, when an underground fire forced its closure. These closures meant almost complete loss of the Town's industrial assessment. There remained only a few old buildings and a coal chute.
>
> The Town's origin was intimately associated with the coal industry. It was born by the coalescence of pit-head communities which grew up around the places of employment, in support of the industrial activity. Therefore when the coal industry began to disappear, so too did the Town's business activity. As businesses closed their doors, the Main Street, Plummer Avenue, was whimsically referred to as 'Plywood Alley'."

According to Dr. Nathanson, the New Waterford-Lingan-Scotchtown area is a distinct entity somewhat separated from the rest of industrial Cape Breton. In his opinion it was reasonable to consider this whole area as a "single, cohesive, administrative unit". Dr. Nathanson believed that from the mid-1960's on, the role of the Town was to be a bedroom for workers in nearby industrial installations and its purpose was to supply services in support of that industrial base.

Dr. Nathanson gave a survey of the basic services to illustrate the interdependence of the needs of the industries in the area and those of the Town. The railroad which diagonally bisected the Town was extended by Devco through the remainder of the Town to reach the new developing mine site at Lingan. Subsequently the railroad was extended further to the power generating plant at Lingan and the Phalen Mine site. The Town maintains the warning lights at the eight level crossings within the Town limits which were considered necessary because of the increase in rail traffic from the reactivated and extended rail line through the Town.

The upgrading and extension of the Town's sewage collection system begun in the early 1970's was designed and sized to accommodate the adjacent residential area of the Municipality (Scotchtown) and the needs of the newly developing Lingan and Phalen Mines, all of which now connect to a trunk sewer line running through the Town to an outfall at Barrachois Cove.

The Town and surrounding areas in the Municipality are serviced with electricity through a substation constructed at an old colliery site within the Town, with service extended from this substation to the Lingan Mine along the railway right-of-way.

The New Waterford and District Water Utility, which resulted from the takeover of the Dominion Coal Company's water utility, Dominion Utilities Limited, acquired in 1966 by the Nova Scotia Power Corporation, has County representation on its Board because 1/3 of its customers are County residents. The utility supplies the Lingan and Phalen Mines and the Lingan power generating station. According to Dr. Nathanson, the utility is owned by the Town and has no provision for County participation in capital costs or the sharing of operating deficits.

The New Waterford and District Consolidated Hospital which opened in 1963 was planned as a facility for the needs of the residents of both the Town and the Municipality and the nearby industrial development at the new mines and the power generating station.

The Junior-Senior High School for students from the Town and adjacent County areas is located in the Town. The Town's fire department responds to calls at both mine sites and the power plant. The Town's Police Department responds to calls for assistance from the RCMP who police the County areas surrounding the Town.

Dr. Nathanson's report concluded as follows:

> "The present industrial plant is for the most part, an extension of the same industrial plan around which the Town was born. The original very restrictive Town boundaries were laid out some 75 years ago when the Town was a large 'Camp Site'. This Town is the principle service center for these industries--which are very close to the Town's boundary. It is very reasonable to conclude that these boundaries should be adjusted to allow for the realism of 1986. This would make this a sensible, cohesive, viable, administrative unit that would take its rightful place as the 6th largest Town in

> Nova Scotia.
>
> In conclusion then, it would appear that there are the three possible options to bring financial stability to the Town of New Waterford.
>
> (I) Continue the annual pilgrimage to seek 'emergency financial assistance'. This is most unsatisfactory and is apparently not in keeping with present government policy which is clearly aimed at trying to reduce and eventually eliminate this type of special funding.
>
> (II) Declare bankruptcy and have the Town revert to Village status. This is unacceptable for several reasons.
>
> a) Property investment must be protected, because in most cases, all that most residents own are their homes.
>
> b) It would be most unfair after the investment of tens of millions of dollars in infrastructure and area planning.
>
> c) Immediate job loss would involve the Police Department, Street and Works Department and the Development Department.
>
> d) The County of Cape Breton would have to make up the annual shortfall of $750,000 or drop services to a totally unacceptable level.
>
> (III) Accept the reality of 1986 and allow the Town to become a self-sufficient entity by adjusting its borders to annex the necessary 1300 acres.
>
> This is the best and least disruptive of all options."

In cross-examination, Dr. Nathanson acknowledged that he had not seen the Town's application for annexation but he believed that it was reasonable because the "alternatives" were "drastic". He agreed that his concept of the natural, interconnected area around the Town included Scotchtown, Roaches Road and the McLellan Subdivision and he was not aware of the reason(s) why these areas had been excluded in the Town's annexation application. Dr. Nathanson explained the he felt property values in the Town would fall if annexation were not approved because he believed that most people preferred to live in an urban area because of the services and if services could not be maintained, property values would go down.

Jerry Ryan, the Town Clerk since 1970, reviewed his report to the Board in support of the annexation application, Exhibit N-4, which sets out the Town's financial difficulties, the history of the operating grants and emergency funding from the Province, the financial effects of the Town's takeover of the Dominion Utilities Water Utility, and the Town's support of social and recreational services.

Mr. Ryan outlined the present municipal grants system initiated by the Province in 1980 which consists of an operating grant and a capital grant, both paid annually to municipal units. The formula used to calculate provincial operating grants is primarily based on a standard cost of providing municipal services to each household in the unit according to the classification of the unit into one of 5 types (cities, large towns, towns, urban areas of municipalities and rural municipalities). Operating grants are unconditional and an initial transitional period ensured that no municipal unit suffered a loss in operating grants because of the change in the system.

Although the grant system begun in 1980 was an improvement over the previous grant structure in Mr. Ryan's opinion, some municipal units still required emergency funding from the Province because their operating grants together with property tax revenues were insufficient to meet their financial needs. New Waterford has required emergency funding since 1966 primarily because of the inadequate assessment base. Exhibit I to Mr. Ryan's report shows the 1986 uniform assessment for each of the 39 towns in the Province and the proportion of residential and commercial assessment for each unit. The ratio of residential to commercial assessment is calculated for each town and they are ranked in order according to that ratio. New Waterford is tied with Westville at the bottom of the list with the most disadvantageous ratio of 88% residential assessment to 12% commercial assessment.

Although the Town has received emergency funding for the past 20 years, the new grant system initiated in 1980 visualized very limited use of this measure. The administrative criteria used by the Department of Municipal Affairs in evaluating requests for emergency funding according to a letter from the Minister to the Mayor of New Waterford dated November 28, 1986 (Exhibit N-16), are the following:

> (a) Unless taxes are unusually high, an increase in taxes considerably above the average must be accepted as a precondition;
>
> (b) Severe budgetary restrictions must be adopted;

(c) Borrowing approvals would be limited to serious emergency situations only;

(d) A full investigation of the administration, accounting and budgeting of the recipient municipal unit must be carried out, preferably as part of the investigation of entitlement;

(e) Serious study of the possibility of dissolution or trusteeship;

(f) Acceptance of a plan of action designed to eliminate any need for emergency funding."

Because of financial constraints faced by the Province, Mr. Ryan stated that the Department of Municipal Affairs has adopted a policy to reduce and eventually eliminate emergency grants to any one municipal unit. The Town experienced the effects of this policy in 1985 and 1986, when its requests for emergency funding of $783,081.00 and $583,000.00 respectively resulted in funding of $583,000.00 in 1985 and $350,000.00 in 1986. In order to make up the shortfall in its operating budget in both those years, the Town was forced to use all of its "special capital grant" of $250,000.00 for operating expenses. This "special capital grant" was the result of an agreement between the Town and the Province to compensate the Town for a reduction in its capital grant because of the repayment on the debt of the water utility which the Town took over in 1975. The special capital grant was to run from 1982 to 1986 with the condition that it be used for capital purposes.

In its 1985 budget the Town incurred an operating fund deficit of $18,408.00 in spite of the diversion of the special capital grant to the operating fund. The emergency funding for that year was not approved until late August, costing the Town over $13,000.00 in unbudgeted bank interest charges and a loss of over $14,000.00 in interest revenue.

In preparing its 1986 budget, the Town Council estimated that it might anticipate the same level of emergency funding as it had received the year before ($583,000.00) and that it would be necessary to direct the special capital grant again for operating expenses. The grant of emergency funding, however, was $350,000.00, resulting in a $233,000.00 budget shortfall.

Mr. Ryan forecast that the Town's budget process in 1987 would have to consider the following realities:

> "(1) the 1987 operating budget will have to be increased by the previous year's deficit, presently estimated to be $233,000 (1986 budget revenue shortfall);
>
> (2) the Town's annual special capital grant of $250,000 ends in 1986 and will not be available for utilization as a source of operating revenue as has been the case in 1985 and 1986;
>
> (3) due to inflationary factors alone, municipal service costs will rise in 1987 and therefore, given the fact that revenue sources have not increased, another deficit in excess of the previous year's amount of $233,000 can clearly be expected.
>
> (4) provincial indications to date are that the Town can expect to receive even less emergency funding in 1987 than it did in the year 1986;
>
> (5) because of the Town's limited tax base, any increase in tax rates will merely raise sufficient revenue to cover meager salary and wage increases payable to the Town employee group."

Mr. Ryan estimated that the cumulative effect of the first three items in that list could result in an operating fund deficit of $700,000.00 by the end of 1987. He believed that the Town's borrowing capacity would be limited to a maximum of $1 million because of restrictions by the bank and by the Towns Act. Mr. Ryan predicted that the possible result of this growing deficit would be the bankruptcy of the Town.

Mr. Ryan cited social and recreational needs met by facilities and organizations located in the Town and financially supported by it, and gave as examples the Miners' Memorial Society, Family Services, the New Waterford Homemakers Society and the New Waterford and District Community Centre.

The Miners' Society was responsible for the conversion and operation of the former Paramount Theatre into a facility called the Urban Centre which houses the Library, the Mental Health Clinic, the Family Services agency, the New Waterford Homemakers Society, a United Mine Workers of America office and the New Waterford Pensioners Club. The Town contributed the deed to the property, an initial renovation grant of $50,000, full tax exemption and an annual net grant of $15,000.00. Mr. Ryan believed that the Urban Centre offered very necessary community services to the residents of both the Town and surrounding county areas and that it could not operate without the financial support of the Town.

The Family Services agency was located in New Waterford as the result of an agreement between the Town and the Antigonish

Diocesan Charities in which the Town agreed to fund 25% of the operating costs of the office. The Town's share in 1986 was $25,889.00. Without the Town's support, Mr. Ryan said that the Family Services office would be closed, leaving the nearest facility in Glace Bay. The services of this agency are available to both residents of the Town and the Municipality but funding comes from the Town alone.

The New Waterford Homemakers Society was initially given free office facilities by the Town. The Province contributes 93% of the shareable costs of this agency and originally the Town contributed the remaining 7%. Now the Municipality contributes towards that 7% total according to the amount of service received by residents of Municipal districts 4 and 5. The total of the Municipal contributions to the New Waterford Homemakers Society in 1986 was $11,402.00. Because of the difference in the former provincial-municipal cost sharing rates for the Town and the Municipality, the Municipality would need to contribute to a sharing ratio of 81% - 19% if the agency were located in the Municipality rather than contributing to the 93% - 7% ratio assigned to the Town. According to Mr. Ryan, the homemaker service would have required a municipal contribution of $30,949.00 in 1986 if it had been located in the Municipality rather than in the Town, and so all users of the service whether resident in the Town or the Municipality benefit from its current location.

The New Waterford and District Community Centre, constructed in 1973, is a facility used by residents of both the Town and the Municipality. The Town granted tax exemption to the Centre for the years 1973-82, costing approximately $25,000.00 per year. In 1984 at the expiry of a 10 year agreement on tax exemption the Town reduced its tax exemption by 1/3 and attempted to persuade the Municipality to share this burden by that amount. The Municipality would not agree to do this so in 1985 the Town reinstated the full tax exemption for the centre in order not to jeopardize its financial stability.

From these examples of services and facilities financially supported by the Town, Mr. Ryan drew the conclusion "that New Waterford must continue to exist as a municipal entity if the needs of the residents of this area are to be adequately addressed."

Mr. Ryan expanded on the essential connections between the Town and the industry located in the area proposed to be annexed as follows:

> "I think it has to be recognized from the outset that New Waterford was a one industry town, that industry being coal, and is now a no industry town. By the very nature of the mining industry, opportunities to diversify the economic base of the New Waterford area are limited and any future industrial growth in this area will likely be coal related and located within the proposed annexation area. If the economic viability of New Waterford as a municipal unit is to be maintained, then clearly the supporting industry must be on New Waterford's tax roll.
>
> I think it is important to point out that the Town of New Waterford has in the past co-operated and encouraged industrial development in this proposed annexation area through its provision of water service to the industry located there and by permitting both mine sewer lines to be connected into the Town's sanitary sewer system. Should new industrial

development take place in this area, such as a plant to recover methane gas from the coal mines, or expansion of the Nova Scotia Power Corporation generating facilities, or the development of aquaculture, then I would contend that the Town of New Waterford will be an important participant in such growth by nature of its existing services in this area and furthermore by the fact that this Town realizes that its very reason for continuance as a municipal unit lies in maintaining industry in this area, particularly the coal industry.

The Town of New Waterford is willing and anxious to work with the Cape Breton Development Corporation and the Nova Scotia Power Corporation to explore and develop possible spin-off industrial development such as those mentioned previously. These are the areas of economic development which New Waterford believes some growth can be achieved; growth that is so desperately required to maintain a stable economic tax base for the town and to help address the chronic unemployment which plagues this area."

Mr. Ryan further summarized the Town's financial arguments for annexation as follows:

(1) the Town is facing a financial crisis which will result in bankruptcy if some additional operating revenues are not realized.

(2) the Town's annual operating expenditures incurred to provide municipal services to its residents are not exorbitant in relation to other towns within Nova Scotia (Exhibit 10) and thus the possibility of reducing costs to any great extent is not a realistic solution to the Town's financial problems;

(3) the lack of an industrial base is the sole major reason for New Waterford's present financial dilemma;

(4) Emergency Funding and Special Capital grants which have enabled the Town to balance its operating budgets during the past number of years are being eliminated, the

> latter as early as 1987;
>
> (5) the revenue generated from existing industry located within the proposed annexation area will provide the Town with the revenue it requires to balance its annual operating budget, and the possibility of future industrial growth in this area will allow the Town to dream and plan for the day when its energies can be expended for purposes other than mere survival;
>
> (6) the financial loss to the County of Cape Breton will not be exorbitant and will not result in undue hardship to county taxpayers."

Mr. Ryan filed Exhibit 10, a table showing the population and 1986 operating budgets of the 39 towns in the province sorted according to operating expenditure per capita, with New Waterford ranked fourth lowest.

Mr. Ryan addressed the issue of the interests of the residents living in the subject area by suggesting that the Town would be prepared to extend sanitary sewer services to all but the single most distant home and that the Town was prepared to recommend that some suitable "phase-in" period of up to 20 years be established in relation to any resulting residential property tax increases. The 1986 tax rate for the Town was $1.99 in comparison to the tax rate in District 5 which was $1.05 in total consisting of a 91 cent general rate and a 14 cent area rate. Mr. Ryan stated that the area residents who live in the mobile home park would not be evicted by the Town if annexation were approved, as had been suggested by MLA Paul MacEwan. The Town's

Land-use By-law does not allow mobile home parks within the Town so the existing mobile home park in the subject area would become a legal non-conforming use if annexation were approved. Mr. Ryan stated that there were "legal safeguards governing existing zoning in annexed areas under the Municipal Boundaries and Representation Act."

In cross-examination, Mr. Ryan agreed that the life of any coal mine was limited but the Town hoped that the loss of the assessment for the Lingan and Phalen mines, when that occurred, would be compensated for by new industrial assessment attracted to the Town by the existence of the coal mining industry. He gave as an example the exploration of aquaculture operations which could be located on the Power Corporation's Lingan generating plant property. Mr. Ryan agreed that any expansion of the Lingan generating station would have no beneficial effect on the revenues of the municipal unit in which it was located because the grant in lieu of taxes paid by the Power Corporation is calculated according to the amount of revenue derived by the corporation from that municipal unit.

Mr. Ryan was asked whether the Town had seriously considered the dissolution of the Town, which was the choice made by the former Town of Inverness when coal mining ceased to provide the revenues it needed. Mr. Ryan's response was that the Town had looked "briefly" at the legal implications of dissolution and at the implications for the delivery of service but did not consider it a viable alternative because it was felt that only a Town structure could continue to deliver the present level of services. If the Town were to revert to village status it was felt that it was not sufficiently close to any other municipal unit which could provide the service levels currently provided under the Town structure. Mr. Ryan stated that the Town did not have a contingency plan to deal with the possibility of bankruptcy which he believed would result if the annexation application was not approved. If that happened Mr. Ryan believed that the Town would have to consult with the Department of Municipal Affairs and if dissolution was the remedy indicated, commence discussions with the Municipality.

Mr. Ryan agreed that if the Province would give a guarantee of an adequate level of annual emergency funding to compensate the Town for its lack of industrial base, the Town would not need to apply for annexation.

Mr. Ryan agreed that if the residential properties in the subject area were excluded from the annexation area, the remainder of the land is owned by two Crown corporations Devco and the Power Corporation. The principle means by which the Town could assist with additional industrial development in the subject area he felt would be by the provision of additional sewer or water services if needed and by providing such services as police protection and snow clearing.

Mr. Ryan estimated that the increase in taxes to Devco if the Town were successful would be approximately $300,000.00 because the Town's tax rate is roughly double that of the

Municipality. He confirmed that the Town was not advocating a phase-in for tax revenues based on commercial assessment similar to the phase-in it advocated for the increased taxes which would be experienced by residential property owners in the subject area if annexation were approved.

Bernie White, employed by the Town for approximately 10 years and currently Director of Social Services for the Town, gave evidence on the programmes funded by the Provincial Department of Social Services and the financial costs for social programmes offered by the Town.

Mr. White explained the three main categories of expenditure for social services and the provincial-municipal cost sharing ratios applicable to each. General Assistance ("Welfare") costs and Administrative costs are cost shared on the 93-7% ratio used by the former Municipal Services Act, a cost-sharing ratio linked to the Town's financial capabilities. New Waterford has the highest sharing ratio in the province. The third category of social service expenditure is the cost of maintaining residents in Homes for Special Care. Municipalities pay 33 1/3% of that expense and the Province is responsible for the remaining 66 2/3%.

Traditionally, Mr. White said, the Provincial Department of Social Services annually allocated a budget for social service costs to each municipal unit, but would agree to cost-share over-expenditures by a municipal unit on the same percentage basis as the initial allocation if they were considered reasonable. However, since 1984, basic allocations to municipal units have been frozen, and at the same time over-expenditures are now cost-shared by the Province on a 50-50 basis for General Assistance and administration expenses, while over-expenditures for residents in Homes for Special Care receive no additional cost-sharing from the Province. The change from New Waterford's favourable funding ratio of 93-7%, to either a 50-50 cost sharing ratio, or 100% payment for over-expenditures has had a "catastrophic" effect on the Town according to Mr. White. He pointed out that the Town had legal responsibilities to provide social services and was experiencing increased caseloads because of very high unemployment in the Town.

Mr. White cited total expenditure figures for General Assistance and Homes for Special Care by the Town in the years 1960, 1970, 1979 and 1985 to illustrate the rapid escalation of these costs. According to him the rapid rise in expenditures which took place in the 1970's is accounted for by the new availability of Homes and the participation by the Town in the new Home Care program. These figures are as follows:

1960 - $ 12,431.30
1970 - $ 51,424.30
1979 - $ 457,940.88
1985 - $ 785,893.32

Mr. White expressed the opinion that the costs to the Town of the Homemakers Service probably gave a "ten-fold" saving to the Town by making it possible for people to remain longer in their own homes, thus saving the Town the much higher per diem costs of Homes for Special Care.

Mr. White explained Exhibits I and II to his report (Exhibit N-5) which are tables showing the totals and the breakdown of various categories of Social Services expenditures by the town during 1986, with the proportions of the total expenditures paid by the Town and by the Province. Exhibit II shows that the total provincial allocation of gross municipal expenditures approved for cost-sharing in 1968 was $875,230.00. Of that total, the Province contributed $672,963.00 and the Town contributed $202,267.00. Exhibit II shows estimates of expenditures which indicate that over-expenditures are anticipated in every section of the budget. For the estimated total over-expenditures of $150,270.00, Mr. White calculated that cost-sharing of $28,360.00 could be expected from the Province and $121,910.00 would have to be borne by the Town. Mr. White said that the anticipated over-expenditure of $121,910.00 in his social services budget represented more than half of the Town's deficit anticipated in 1986 ($233,000.00).

In Mr. White's opinion, the Town has been socially progressive in its support of social service programs which he described as "a compassionate program which is frugally operated". He disagreed that the Town was providing a level of social services in excess of those offered by other municipal units in the industrial Cape Breton area, where he explained a regional policy had been adopted and was adhered to by all other units with the possible exception of the Municipality.

Mr. White believed that the unemployment rate for the Town was 25-35%. This figure represented those people who are unemployed but actively seeking work. If the numbers of Town citizens who have given up looking for work were added, he felt that the real unemployment rate could be as high as 60%. Mr. White summarized the situation of his department as one in which the hard times experienced in the Town caused increasing social needs which could not be met because of Provincial funding restraints and cut-backs affecting his department and the Town as a whole. He anticipated that the full program of social services currently offered by the Town would have to be cut back because of financial necessity.

In cross-examination Mr. White agreed that the figures he had cited to illustrate growth in Social Services expenditures in the Town between 1960 and 1985 were totals which included the 93% share which would have been funded by the Province. Although he agreed that other departments in the Town could contribute to the Town's deficit he disagreed that over-expenditures in other departments would be on a similar scale. He agreed that a bad winter would cost the Town extra money for street clearing but contended that "There's a snowstorm everyday in Social Services". Mr. White agreed that other municipal units in industrial Cape Breton were also adversely affected by the financial restraints imposed since 1984 by Provincial Social Services.

Mr. White said that the increased costs to the Town for residents in Homes for Special Care in 1986 were due to increased per diem costs rather than increased numbers of residents requiring that support. The Town currently has 51 people needing subsidization in Homes for Special Care. The Town's population is 8,808 of whom approximately 2,600 are senior citizens.

David Johnston, a chartered accountant and partner with the firm of Thorne Ernst and Whinney in Sydney, gave evidence on the impact of annexation on the 1986 tax rates in the Town, as set out in his report to the Board, Exhibit N-3. Mr. Johnston has had considerable experience as engagement partner directly responsible for audit and other services to various municipal clients in Cape Breton. Currently he is engagement partner for 3 municipal units, three water utilities, three Homes for Special Care and two hospitals, all in Cape Breton.

Mr. Johnston described the Town's current situation as a "financial crisis" and in addition to the arguments made for annexation by previous witnesses on the grounds of historical right, and the pursuit of industrial development, he stressed that he believed that "without annexation the Town of New Waterford may not financially survive, i.e. it may not be able to deliver the usual municipal services at a taxation level that is just and equitable to its residents". Mr. Johnston considered that the Town's principle problems were a continued reliance on emergency funding from the Province, a weak assessment base, high tax rates and a "volatile budgetary process" which he explained as a heavy dependence on a soon-to-expire capital grant used for operating purposes, and a level of emergency funding which was unpredictable and likely to be reduced in future. For all these problems he believed the "most viable" solution was an expansion of the assessment base of the Town through annexation. He allowed that "obviously" annexation would not be a viable solution if it offered relief to the Town but created undue hardship for the Municipality.

To estimate the impact annexation would have on tax rates for the Town, the Municipality as a whole, and District 5 of the Municipality (the proposed annexation area is part of District 5), Mr. Johnston considered the financial areas affected by annexation using 1986 figures.

Annexation would affect the assessment base for both the Town and the Municipality by increasing the assessment base for the Town and correspondingly decreasing the assessment base of the Municipality. Additionally the assessment base for the area rates levied in District 5 would be reduced. Mr. Johnston calculated that $458,100.00 of 1986 residential assessment would be acquired by the Town by annexation (this assumes that residential properties would not be excluded as the Town had volunteered to do at the commencement of the hearing). The 1986 residential assessment of $458,100.00 which could be affected by annexation consists of 14 residential properties totalling $248,400.00 in assessed value and a "Trailer Court" containing 19 units, assessed at $209,700.00.

Commercial assessments affected by annexation are the mine properties of Lingan and Phalen for which Devco voluntarily pays a grant in lieu of taxes based on full assessed value at current commercial tax rates even though its property is classified as "commercial exempt". The total 1986 assessment for the Lingan Mine was $17,532,000.00. The newer Phalen Mine, not fully developed in 1986, was only partially assessed in that year. Mr. Johnston made the assumption for his calculations that Phalen would eventually have an assessed value equal to that of the Lingan Mine. He noted that the Municipality had not budgeted for any grant in lieu for the Phalen Mine in 1986.

Some expenditures for regional services by both the Town and the Municipality are based on assessment and would be changed by annexation according to Mr. Johnston. The contributions of each unit to the cost of correction services, the Joint Expenditure Board and the Cape Breton District School Board would be so affected.

Finally Mr. Johnston anticipated that annexation would change the revenues for both Town and Municipality which are derived from the provincial operating grant. The Municipality's "supplementary operating grant", in effect a six-year revenue guarantee instituted in 1980 when the new provincial grant structure was introduced, comes to an end with the 1986 grant.

After setting out the various factors which impact on the current financial situation of the Town, the Municipality, and District 5 in the Municipality, Mr. Johnston used the 1986 budgetary and tax rate setting process as a model which he modified to show the impact of the failure of approval of the annexation application. The factors used to modify the historical 1986 municipal budget and tax rate setting process were the following:

"1. New Waterford loses the capital grant

2. Cape Breton County loses the supplementary operating grant

3. New Waterford loses emergency funding

4. Phalen is included in the total assessment

5. If annexation is successful, New Waterford would provide a rate subsidy to District #5."

The assessment base in 1986 was:

Town	$ 75,818,571.00
Municipality	658,465,235.00
District 5 of Municipality	42,066,480.00

If annexation fails, the assessment base would be:

Town	$ 75,818,571.00
Municipality	675,997,235.00
District 5 of Municipality	59,598,480.00

(The difference reflects the addition of the projected Phalen Mine assessment to the base of both the Municipality and District 5).

If annexation is approved, the assessment base would be:

Town	$111,340,671.00
Municipality	640,475,135.00
District 5 of Municipality	24,076,380.00

(The difference reflects the addition of residential and Lingan and Phalen commercial assessment to the Town, and the loss to both the Municipality and District 5 of the residential and

Lingan commercial assessment).

After considering how the net revenue requirements for each unit would be affected by the failure or success of the annexation application, Mr. Johnston projected tax rates for the Town and the Municipality and area rates for District 5, assuming that both Town and Municipality would maintain their existing ratios of residential to commercial tax rates. The results of this calculation are the following tax rates/area rates:

Residential Rates

	Existing	No Annexation	Annexation
Town	$1.99	$2.93	$1.93
Municipality	.91	.88	.94
District 5	.14	.09	.14

Commercial Rates

Town	$4.02	$5.92	$3.90
Municipality	2.46	2.38	2.54
District 5	.14	.09	.14

The stability of the District 5 area rate would result from a projected payment by the Town of $18,800.00 to "stabilize the District 5 rates" and compensate for the loss of a large portion of the district's assessment.

Mr. Johnston commented that the cost of administration or general government expenditure, a matter raised in cross-examination of the Town Clerk, represented 12% of the 1986 budget of the Town and 12.3% of the 1986 budget of the Municipality. It had been suggested by Counsel for the Municipality that administrative costs as a percentage of budget for "a majority" of municipal units in the Province ranged between 5.5% and 6.5%

Mr. Johnston concluded that annexation as proposed by the Town would reduce both residential and commercial tax rates in the Town by approximately 3% while the tax rates for the Municipality would increase by 3.3%. District 5 area rates would remain stable because of a projected grant from the Town to the Municipality for that purpose. If annexation did not take place he projected a 47% increase in both residential and commercial tax rates in the Town, while the Municipality would experience a 3.3% decrease in both rates, and an unquantified potential decrease in the District 5 area rate, because of the projected impact of the new Phalen Mine assessment which was previously not calculated into the budgetary process by the Municipality.

Mr. Johnston stated that following the preparation of his report he understood that the Regional Director of Assessment had given a written opinion that "a fair assessed value" for 1986 for the Phalen Mine would be "in the range of $18 1/2 million."

In cross-examination Mr. Johnston stated that he had not investigated other sources of revenue other than those which could be derived from the lands proposed for annexation. He agreed that the Town was not at the highest level of taxation among towns in the province and that there was "perhaps a little bit of room" to increase taxes. He conceded that he had not examined other possible viable solutions to the Town's financial difficulties such as restructured provincial grants, regional government, regionalization of services or reverting to village status. He contended however, that the Town's assessment base was much weaker than the Municipality's and that the Municipality's tax rates were in better shape relative to other municipalities than the Town's tax rates were relative to other towns in the province and so he had concluded that the Municipality is in a better financial position than the Town when each is compared to its peers.

Mr. Johnston agreed that annexation as a remedy for the Town's financial woes would not be successful if and when the mines closed down. He would not agree that DEVCO was likely to abandon plans for further development of the Lingan and Phalen Mines because of a 50% increase in "taxes" which would result from annexation. He felt that it would be "hard to say" whether DEVCO would reconsider its policy of paying grants in lieu of taxes equal to commercial taxes on the full assessment of its properties, in the light of a 50% increase of such payments which could result from the proposed annexation.

Mr. Johnston acknowledged that he had not considered the matter of compensation to the residents in the proposed annexation area for the potential 100% increase in their taxes, or compensation to the Municipality for the loss of the current assessment and future assessment potential. He also had not considered the possibility of the Municipality taking over the Town.

The first witness called by Counsel for the Municipality was Warden Joseph Wadden, who has been Warden for 4 years and a member of Council for 31 years representing District 15. He is past president of the Union of Nova Scotia Municipalities and Chairman of the Joint Expenditure Board. He has been a member of the executive of the Federation of Canadian Municipalities and was the first Chairman of the Cape Breton County District School Board. He is a member of the Formula Review Committee which annually determines the provincial funding formula for district school boards and is co-chairman of the Premier's Fact-finding Committee on the grant structure in the province.

Warden Wadden stated that 4 municipal units needed special financial assistance from the Province in 1980, the year in which the current grant structure began. By 1985, 17 municipal units received special assistance. Of these 17 units receiving special assistance, Warden Wadden believed that in 1986 only the Town of Glace Bay received as much or more in assistance as it had received in 1985, because of its special circumstances. The costs of many services are being shifted from the Province to the municipal units, he said, citing social services, correctional institutions and education costs. The justification by the Province for this transfer of costs, according to Warden Wadden, was the existence of large surpluses in some municipal units, however, while some units did have surpluses, many towns and municipalities were in need of special assistance.

The Warden stated that he considered that the Municipality was a partner and part owner in the New Waterford and District Water Commission, and was represented on the Board. The Municipality also participates in the responsibility for the operation of the New Waterford and District Hospital.

In Warden Wadden's opinion, the Municipality is a leader in advocating some form of regional government or regional co-operation. He expressed apprehension however about the number of other Municipal units in industrial Cape Breton who also had economic reasons to consider annexation applications and he specifically mentioned the City of Sydney and the Towns of Sydney Mines and Glace Bay. "It's like a greyhound track", he said, "They're all at the post now waiting to go.... and the County is the rabbit".

The Warden listed the mining communities in the Municipality which have experienced mine closures: Donkin, Birch Cove, Florence, Reserve, Gardiner, and New Victoria. Those communities were left in "not very good financial shape" when new mines were opened in the Towns of New Waterford, Glace Bay and Sydney Mines. He felt that now the trend was to mine closures in towns and new mine development in the Municipality again. However, the potential of new mines is hard to estimate. He stated that the new Donkin Mine had not developed as projected and that it had never reached the level of assessment which the Municipality had anticipated.

Warden Wadden opposed the Town's application for annexation because the loss of the Lingan and Phalen mines assessment would deprive the Municipality of the tax base it needs to provide services for its growing population at a level of taxation which its people, especially the elderly and those on pension, can afford. The income from the mines in the area proposed for annexation had been assumed in the undertaking of servicing projects already in place in the Municipality.

The only solution for the problems of the Town according to Warden Wadden was a restructuring of the provincial grant system. An annexation was "a tax grab", and "a temporary solution", when what was needed in the area was long range planning rather than temporary solutions.

In cross-examination, the Warden agreed that the Town was in a desperate financial position and said that the immediate solution was special assistance from the Province in the amount provided in 1985, since it was the Province which was responsible for the fact that the Town could not wait for the long-term solution (re-structuring of the grant formula). He felt that the Town should have been represented at the 1986 Union of Nova Scotia Municipalities' Conference to join with other municipal units in pressing for a revised grant structure, recognizing that they were not alone in their financial difficulties. He reaffirmed his belief that there was no "quick fix" for the financial problems of Municipal governments and that "the momentary grab of revenue from one municipal unit to the other .... will assist momentarily, but it's not the proper solution." Warden Wadden said that he felt that the municipal units had not "properly worked at gaining the solution" to the problems of some units who needed special financial assistance.

Peter Weedon, a principal with the accounting firm of Doane Raymond in Halifax who has an M.B.A. and is a Certified Management Consultant with 12 years experience, gave evidence on the financial impact of the proposed annexation as set out in his report, Exhibit N-9. At the time of the hearing Mr. Weedon was a financial adviser to the Union of Nova Scotia Municipalities.

Mr. Weedon explained that his report took the approach of showing the relative financial positions of the Town and the Municipality as if annexation took place December 31, 1985 at a minute before midnight. Mr. Johnston, on the other hand used , according to Mr. Weedon, a "futuristic or pro forma" approach.

Mr. Johnston had calculated that if annexation was not approved, the tax rates in the Town would be $2.93 (residential) and $5.92 (commercial) and if annexation was approved the residential rate would be $1.93 and the commercial rate would be $3.90. From this Mr. Weedon concluded that what was at stake in the future for the Town was a 34% reduction in tax rates if annexation was successful from what they would have been if the Town balanced its budget. In contrast, he pointed out that annexation would result in a 6.8% increase in the commercial rate for the Municipality and a 11.3% increase and a 8.5% increase respectively for the District 5 residential and commercial rates, which consist of the general rate and area rates combined. In addition, the residential and commercial tax rates in the proposed annexation area would increase by approximately 99% and

58% respectively.

According to Mr. Weedon, annexation would produce a net impact on the Municipality of a loss of $484,100.00 in revenue. To that could be added the loss of an $11 million increase in assessment of the Phalen Mine which he had not calculated but estimated could produce an additional $200,000.00 - $300,000.00 in revenue.

Mr. Weedon said that the increased revenues to the Municipality which would result from the completion of the Phalen Mine (if annexation did not occur) would benefit not only the Municipality but also other municipal units because of the resulting re-alignment of provincial grants and changes in the proportional sharing for jointly funded regional enterprises.

Mr. Weedon's personal reaction to the Town's annexation application was "mixed". He acknowledged that "something's got to be done by the Town of New Waterford in the reasonable immediate future". He felt however that the annexation application was "divisive" when what was needed was support for regional co-operation. His suggested alternatives for the Town were full exploration of village status or regional government, although he acknowledged that the Town's upcoming 75th anniversary would make the prospect of a change in status difficult for the Town.

Mr. Weedon pointed out that the $484,000.00 net loss to the Municipality which would result from annexation was slightly more than twice the $233,000.00 emergency funding short-fall experienced by the Town. From this Mr. Weedon concluded that the Province which was "obviously ... in dire straits" was sharing its short-fall with many municipalities, with the Town picking up $233,000.00 of the short-fall and the Municipality penalized twice that amount if annexation was approved.

In calculating the financial impact of annexation, Mr. Weedon used figures from the Municipality's 1986 budget. He estimated the Municipality's net revenues to be $19,826,908.00 excluding any revenue from the Phalen Mine or the proposed annexation area. To recover that revenue short-fall, a 4.93% increase in the tax rate would be required. In estimating the impact on the annexation area, Mr. Weedon assumed no phase-in to the higher tax rates of the Town. He calculated that the average tax increase per dwelling unit would be $133.00 and the increased cost to Devco which pays grants in lieu of taxes as though its property was fully taxable would be an additional $336,308.00.

Mr. Weedon estimated that annexation would produce a revenue surplus for the Town of $65,000.00, resulting from an estimated increase in revenues of $225,100.00 offset by increased expenditures in transportation services (snow plowing and road maintenance), police services, social services, garbage collection and landfill costs, and transfers to Joint Expenditure Board, the District School Board and Correctional Centre, which together totalled $160,100.00.

Mr. Weedon summarized his calculations by stating that the effect of annexation would be to redistribute a total of

$822,500.00 which was comprised of the estimated increased taxes to be paid by residents of the area to be annexed ($4,700.00), the increased grants in lieu to be paid by Devco ($336,300.00) and the increased taxes to be raised by the Municipality to maintain existing services ($481,500.00). According to Mr. Weedon, $822,500.00 which he estimated represented the total amount affected by annexation would be redistributed to benefit the Province by $580,400.00, the Town by $121,800.00 and other municipal units in the province by $120,300.00.

Mr. Weedon concluded that the Municipality was being asked to accept a financial burden ($484,100.00) twice the size of the amount which the Province would not accept for special assistance to the Town ($233,000.00), which he felt was unfair. Given the chronic nature of the Town's financial problems as indicated by special assistance payments over 20 years, he felt that a long term and permanent solution should be sought rather than a short term, stop-gap measure which he considered annexation to be. A successful annexation application by the town he felt would be not only divisive and counter-productive to any further moves in the direction of regional co-operation but would also be a precedent which could encourage additional annexation applications by other struggling units in Cape Breton and throughout the Province.

In cross-examination Mr. Weedon agreed that he had not analyzed the effect of a takeover of the Town by the Municipality, or village status for the Town, or the consequences of the potential closure of the Lingan and Phalen Mines, or the consequences for the Town if the annexation application was not approved. He agreed that a tax increase of 50% for the Town would be the result of the failure of the annexation application, but he disagreed that he was recommending a 50% tax increase for the Town rather than a 5% tax increase for the Municipality.

Mr. Weedon suggested that in order for the Town to obtain financial relief in the next six months or a year it could raise its taxes to the level of the Town of Springhill which would produce 20% of the revenues needed to eliminate the necessity for a 50% tax increase. He also suggested that the Town could explore the possibilities of reducing its operating costs which exceed the provincial standard expenditure. He believed as well that the Province might be persuaded to continue some sort of financial support if it were persuaded that real efforts were being made by the Town and other municipal units to "aggressively seek an alternate form of government". He commented that the crisis which the Town faces should have been foreseen some time ago. In his opinion people [in crisis] were not willing to let go and the first priority was to "maintain the status quo".

James Cunningham, Chief Administrative Officer for the Municipality since 1981, reviewed his analysis of the impact of the Town's application set out in Exhibit N-8. Mr. Cunningham attended the Universities of Strathclyde and Glasgow and worked for the City of Glasgow before emigrating to Canada in 1970. He worked for the Province of Ontario and the City of Cornwall before being appointed to his present position with the Municipality. He is also Executive Director of the Cape Breton County Joint Expenditure Board (Jointex).

In Mr. Cunningham's opinion there was no justification for the Town's application which was based solely on the Town's need to increase its taxbase by additional industrial and commercial assessment. Regardless of the Board's decision he believed that people and corporations would continue to migrate between municipal jurisdictions for a variety of reasons, not all of which were economic. The Town's boundaries were man-made and therefore artificial, he felt, whereas the Municipality is an economic and socio-economic region. He emphasized the importance of Section 22 of the Municipal Boundaries and Representation Act which states:

> "Section 22(1) The hearing of the application shall be in accordance with the Municipal Board Act and the Board may, if satisfied that the order is in the best interests of the inhabitants of the area, taking into consideration the financial and social implications of the order applied for, grant the order of amalgamation or annexation."

The need for industrial development is a serious regional issue for industrial Cape Breton, according to Mr. Cunningham. However, "Too often in Cape Breton we tend to deal with the problems in atmospheres of conspiracy and conflict, we are either fighting with one another over certain things or we're making deals behind each other's back, and that is a situation with industrial Cape Breton that must be addressed by the community and can only be addressed by the community."

Mr. Cunningham set out the assessment indices for the eight municipal units in industrial Cape Breton, showing the proportion of residential and commercial assessment for each. He pointed out that these ratios were based on taxable assessment, not uniform assessment, and so excluded equivalent assessed values for payments in lieu by DEVCO. The eight assessment ratios were as follows:

Municipal Unit	Residential	Commercial
City of Sydney	68	32
Town of Glace Bay	83	17
Town of North Sydney	79	21
Town of Sydney Mines	85	15
Town of Dominion	89	11
Town of Louisbourg	54	46
Town of New Waterford	86	14
County of Cape Breton	84	16

Mr. Cunningham cited the assessment ratios to show that without revenues from DEVCO properties, the Municipality is in a very similar state to the Town, when compared to the provincial average of 60/40 of residential to commercial. He expressed concern that DEVCO's "new mandate" from the federal government to make the coal division commercially viable might be threatened by the increased "taxation" of the Lingan and Phalen Mines. He also raised the possibility of a mine accident which could jeopardize the future of the two mines.

Mr. Cunningham estimated the impact of annexation on revenues and expenditures of the Municipality and the Town using 1986 as the base year, including the assessed value of the Phalen Mines ($6 million) and assuming that the Town's 1986 budget was balanced even though there was an anticipated short-fall of $233,800.00 in special assistance. His results are as follows:

"Item	County of Cape Breton $	Town of New Waterford $
Revenue Raised by Application of the Mill Rate	(622,699)	963,736
Less Unconditional Operating Grants	42,865	(166,754)
Regional Services	94,236	(94,243)
Operating Costs	-	(143,000)
Non-Recurring Items	-	(883,000)
Net (Loss)	(485,598)	(323,261)"

Mr. Cunningham noted that he estimated that the Town's operating costs would increase by $143,000.00 because he believed that a significant expansion of services to the annexed area would be required.

To show the impact of annexation on residential taxpayers, Mr. Cunningham calculated average residential rates for each of "the subject area", District 5, the Municipality and the Town. He then forecast residential tax increases of 111% for the subject area, 13% for District 5, 5% for the Municipality and

11% for the Town, assuming that there would be no phase-in of the tax impact of annexation.

In cross-examination, Mr. Cunningham agreed that his 1986 figures indicated that the Town would be worse off even if it succeeded in annexation. Mr. Cunningham also agreed that the 5% tax increase for the Municipality which he projected as the effect of annexation would not result in taxes equal the tax levels currently paid by residents of the Town.

In his opinion a possible reversion to village status by the Town, as an alternative to annexation, would not result in significant savings to Town residents because he felt that the costs of roads and policing would not be re-assumed by the Province and in that case the costs of those services would be charged back to the community through an area rate. He also believed that no significant staff reductions could be achieved by the Town through either a change to village status or administration by the Municipality.

Although Mr. Cunningham advocated a form of regional government for the industrial Cape Breton area, he acknowledged that neither the Graham Royal Commission Report nor the Finnis Report which recommended one-tier regional government had been considered acceptable in the late 60's and early 70's respectively when they were made public. He conceded as well that regional government would not necessarily result in cost savings for tax payers.

In cross-examination on his calculations of the financial impact of annexation, Mr. Cunningham agreed that the net loss of $485,598.00 which he had calculated for the Municipality was an actual loss rather than a budgeted loss. By deleting the actual 1986 revenue received from the Phalen Mine (approximately $160,000.00) the budgeted loss would be $325,000.00 rather than $485,000.00. Comparing this figure with the calculations by Mr. Weedon shown on Table 13 of his report which calculates "Revenue Shortfall Compared to Revenues Raised on Mill Rate", Mr. Cunningham agreed that if Mr. Weedon's calculations had similarly included the actual 1986 revenue from the Phalen Mines, the resulting impact on the Municipality's mill rate (tax rate) would be approximately 3.5% rather than approximately 5%.

Mr. Cunningham acknowledged that there was a difference of $84,300.00 between his estimate of increased operating costs to the Town as a result of annexation and Mr. Weedon's estimate of increased operating costs. He conceded that his calculation of amount of "non-recurring items" for the Town of $883,000.00 should have been $833,000.00 (emergency funds of $583,000.00 + special capital grant of $250,000.00), and that this error affected other calculations in his report. He agreed that if the Town received only $350,000.00 in emergency funding in 1986 rather than the $583,000.00 which was budgeted by the Town, his calculations would be $233,000.00 in excess.

Mr. Cunningham's calculations estimate a loss of $323,261.00 to the Town in the first year of annexation. He agreed that Mr. Weedon had estimated a gain of $65,000.00 for the Town - a discrepancy of approximately $380,000.00. Mr. Cunningham believed that the Town would experience a loss which he revised to an amount of $273,000.00 to allow for the $50,000.00 error previously noted. He explained that the discrepancy between his opinion and that of Mr. Weedon resulted from his preference for "full costs" rather than incremental costs in calculating the Town's increased operating costs which would result from annexation. As well he pointed out that Mr. Weedon had not included the capital grant of $250,000.00, while he had counted it as a "non-recurring item".

Although the calculations and conclusions of Mr. Cunningham and Mr. Weedon differ, Mr. Cunningham summarized his position by saying that he understood Mr. Weedon's report and the assumptions on which it was based and accepted it on that basis, although he could not agree with some of those assumptions. Mr. Cunningham agreed that he had not taken the "snapshot view" which Mr. Weedon had used but instead his approach had been similar to that of Mr. Johnston, the accountant for the Town, with the exception of assumptions on the effect of the Phalen Mine revenues.

Mr. Cunningham agreed that his estimates of increases in the average residential tax rates should be revised to indicate a 109% increase in the subject area and a 9% increase in the Town, with the Municipality reduced to a 3.5% increase, assuming the Phalen Mine was factored into the calculations. If the grant of approximately $18,000.00 volunteered by the Town to compensate District 5 for loss of assessment on which its area rate was based were a reality, Mr. Cunningham agreed that the tax rate increase in District 5 would be the same as for the whole of the Municipality - approximately 3.5%.

Mr. Cunningham acknowledged that his chart of assessment indices for municipal units in industrial Cape Breton which indicated that the Municipality had a 84/16 residential to commercial assessment ratio did not take account of the equivalent assessed values resulting from grants in lieu received by the Municipality. In 1986 the Municipality received the $2.9 million in revenue from this source. Mr. Cunningham agreed that if these revenues were included in his calculations, the residential/commercial assessment ratio for the Municipality would change from 84/16 to 70/30. Since the average for all municipalities in the Province is 75/25 the Municipality is above average in its class, whereas the Town is "at the bottom" of urban units.

Mr. Cunningham's report (as corrected) states that "there is a financial gain to be made by the Town [through annexation] at the expense of the County of Cape Breton." Mr. Cunningham explained that although his figures showed a $323,000.00 loss for the Town in the first year of annexation, he anticipated that the Town would realize a gain of approximately $500,000.00 which would be offset by the "probable absence" of emergency funding and the "real absence" of the $250,000.00

capital grant which had been diverted to the operating budget.

In his role as Executive Director of the Cape Breton Joint Expenditure Board, Mr. Cunningham submitted a breakdown of the 1986 sharing ratios for the member units of Jointex together with adjustments to show the impact of the proposed annexation (Exhibit N-13). He estimated that the shift of the assessment base which would result from the proposed annexation would increase the requisition to be paid by the Town by $27,707.00 and decrease the requisition for the Municipality by the same amount, but that there would be no impact on the operation of the Board.

Councillor Francis Tighe who had represented District 5 in the Municipality for the past 13 months and lives on the Lingan Road in River Ryan, outlined the origins of two petitions opposing the proposed annexation filed as Exhibits N-23 and N-24. Exhibit N-23 was signed primarily by residents of the area proposed for annexation, Exhibit N-23 was circulated in the remainder of District 5. Both petitions show the following statement at the top of each page:

> " We, the undersigned, strongly protest the proposed annexation of 1300 acres of land in District 5 of the County of Cape Breton. Land the town of New Waterford is attempting to annex includes Lingan Mine, Phalen Mine, Nova Scotia Power Corporation's thermal power plant, and about a dozen private dwellings on County Road just south of the town's present boundary."

The total number of signatures on the petition was approximately 1,100 or approximately half of the population of District 5, according to Councillor Tighe.

Councillor Tighe expressed concern about the effect which annexation would have on the possibility of upgrading services in his district, particularly in acquiring water and sewer services, and in general he was concerned about the possible loss of revenue for the Municipality. He stated that it was his opinion that the residents of the area proposed for annexation wanted to be excluded if the application was approved.

Douglas Peach, Chief Financial Officer for the Cape Breton District School Board presented a brief (Exhibit N-10) on behalf of his Board outlining the financial implications of the proposed annexation as directed by the Preliminary Order of the Board. His brief outlined the history of the formation of the District Board and the financial arrangements between the municipal units served by the Board from which the Board derives its operating revenues, as follows:

> "BACKGROUND
>
> The Cape Breton District School Board was formed as a result of the Executive Council of the Province of Nova Scotia adopting the major recommendations of the Commission on Public Education Finance. The Minister of Education commissioned the study on public education finance which recommended the formation of District School Boards. An Interim District School Board Agreement was signed on the 25th day of January 1982 as a result of authorized resolutions from the Councils of the Town of Dominion, Glace Bay, Louisbourg and New Waterford; the City of Sydney; and the Municipality of the County of Cape Breton, the parties of the First Part and the Minister of Education of the Province of Nova Scotia, the party of the Second Part. The parties agreed that the permanent District School Board will be formed not later than November 30, 1982.
>
> FINANCE
>
> A key section of the District Agreement is Section 8 dealing with Finance and Schedule F which shows the proposed allocation of municipal contributions between

1982 and 1987. What the municipal councils essentially agreed to was that education costs should be allocated between municipalities on an ability to pay basis. Since there was a major deviation between the present percentage of municipal contributions and the ability to pay allocation it was decided that the change should occur gradually over five years. One obvious limitation was that the 1987 sharing percentage was based on the 1981 uniform assessment which was the most current figures available at the time the agreement was reached. In keeping with the spirit and general concept of the agreement the municipalities agreed that the 1987 percentage would be adjusted annually to the most current assessment figures and the yearly allocations be recalculated to reflect this adjustment.

The annual adjustments were made for two basic reasons:

1. To reflect more accurately on an annual basis the relative ability to pay of each municipal unit.
2. To avoid any major shifts in costs in a one year period by not recognizing assessment shifts on an annual basis.

ABILITY TO PAY AND REVENUE

The current ability to pay is determined as a percentage of the most recent uniform assessment of the municipal units over the total uniform assessment of the six municipal units. The revenue available to the Board is determined by multiplying the total assessment pool by the prescribed education tax rate. The amount payable by each municipal unit is determined by multiplying the total municipal revenue yield by the percentage municipal ability to pay. Amounts in excess of or less than the revenue at the prescribed rate may occur if agreed to by the municipal units in accordance with Section 8(B)(3) of the District Agreement. Changes in the allocation of assessments between municipal units will have an effect on increasing or decreasing their relative costs, revenues and ability to pay. However, there is no change in the overall impact on the revenue available to the Board. Hence, the Board will not experience greater or lesser revenues as a result of the decisions taken by the Municipal Board."

Mr. Ryan, Clerk of the Town, in his role as

Secretary/Treasurer of the New Waterford and District Water Commission, submitted a brief statement (Exhibit N-7) on the implications of the proposed annexation for the Water Commission as directed in the Board's Preliminary Order:

> " The proposed Town of New Waterford's annexation of an area of land presently within the Municipality of the County of Cape Breton has really no implications for the New Waterford & District Water Commission. All existing development, both residential and industrial, within this proposed annexation area is presently receiving water service supplied by our Commission and the outcome of this annexation application will not effect this situation in any way.
>
> The Commission would like to note that it has the capabilities of supplying the water requirements of any new industry which may locate in this area; however, the responsibility for installing any new distribution lines will be the responsibility of the municipality in which this area is located or alternatively, the responsibility will lie with the industries themselves."

A number of persons gave evidence on their own behalf or on behalf of organizations with which they were associated: Paul McEwan, M.L.A. for Cape Breton Nova for 16 years, the constituency in which the area proposed for annexation is located; Richard Sevigny, Executive Director, and Ilona Mackenzie, Supervisor, for New Waterford of Family Service of Eastern Nova Scotia; Wayne Connors, Chairman of the New Waterford Miner's Memorial Association; Janet Wilcox, Co-ordinator of the New Waterford Homemaker Service Society, Michael McKinnon, a volunteer with New Waterford Minor Baseball; Gerald Springhall, a police officer with the Town and President of CUPE Local 232 which represents 53 employees of the Town; Hardy Watts, representing the Board of of Directors of the New Waterford and District Community Centre and Bill Williamson, Fire Chief and resident of Scotchtown, and spokesman for a group of ratepayers of District 5 of the Municipality who had met on several occasions to discuss the annexation application. Mr. McEwan and Mr. Williamson were opposed to the annexation. Mr. Sevigny, Ms. MacKenzie, Mr. Connors, Ms. Wilcox, Mr. MacKinnon, and Mr. Springhall were in favour of the application.

Mr. McEwan professed sympathy for the Town's financial situation, the result he felt of it having been "given the shaft" in emergency funding, the grant formula structure and the cost-sharing on social services over-expenditures. However he cited other towns in industrial Cape Breton (Dominion, Glace Bay, Sydney Mines) which similarly had lost the mines within their boundaries which had been their chief economic support, and expressed anxiety that they could follow the example of New Waterford by attempting to "gouge a piece" out of the Municipality as a remedy for their financial ills. He was opposed to the Town reverting to Village status. He was in favour of regional government in Cape Breton and of an exploration of the concept of revenue-sharing among industrial Cape Breton municipal units. He was supportive of the territorial integrity of municipalities and anxious about their vulnerability to the needs of adjacent urban units:

> "...if the function of a rural municipality in this province is not to be an equal partner

> with the towns and cities in providing services to people but rather to be some sort of a lady-in-waiting, you know, awaiting the future territorial needs of the cities and town then, you know, this is going to have a very adverse impact, in my view, on the efficiency and on the morale and on the integrity of the rural municipalities of this province."

He felt that the form of municipal governments in Cape Breton County was "a very archaic system", stating that "in no other field except in the field of municipal institutions.... it's .... presumed that what was appropriate for the needs of 1913 is appropriate for the needs of 1986...".

Mr. McEwan believed that the 1300 acres proposed to be annexed would radically expand the Town's compact, one-mile-square shape to produce a town of an awkward size and shape. He saw no justification for the inclusion of the lands of the Nova Scotia Power Corporation which would produce no revenue for the Town. [These lands appear to represent approximately half of the area proposed for annexation]. He was firmly opposed to the inclusion of the residential properties in the annexation area whose population totalled approximately 100 people he believed rather than the total of approximately 40 persons estimated by the Town.

In cross-examination, Mr. McEwan said that he believed that regional co-operation, revenue sharing and/or regional government offered the long term solution to the financial problems of the Town but as an "interim plan" he proposed that the Town should pursue the provincial government more aggressively for financial aid as had the Town of Glace Bay.

His interpretation of the phrase in Section 22 of the Municipal Boundaries and Representation Act, which requires the Board to be satisfied that annexation is "in the best interests of the inhabitants of the area", was that the area referred to could be the area to be annexed or the area applying for the annexation or both. He felt however, that "the wishes of the people that live in the area proposed for annexation certainly cannot be overlooked to comply with the terms of that requirement."

Richard Sevigny and Ilona MacKenzie representing Family Service of Nova Scotia explained that the agreement under which the agency office in the Town had been established dates back to 1968. The agency was to "provide counselling and casework follow-up services in an effort to break the chain of chronic welfare dependency" and "to bring to bear all of the social welfare resources of the community on specific social problems and/or cases that are very deep in nature."

The agency's clients come from the Town (2/3) and the Municipality (1/3). The agency in New Waterford is funded by Roman Catholic parishes in New Waterford (3 parishes contributing $3.00 per family per year), the Municipality, the religious orders, the Roman Catholic Diocese of Antigonish, the United Way of Cape Breton County, Provincial Social Services, or the Town. No funding is received from the Municipality or Jointex. The Services of the agency are free and not restricted to any religious group. Both Mr. Sevigny and Ms. MacKenzie felt that an office located in the Town was essential to provide adequate service to those in need and expressed anxiety that if the 25% of their budget contributed by the Town were not forthcoming, services would have to be cut back or offered from the Glace Bay office, which would be a hardship to Town and area residents.

Wayne Connors, Chairman of the New Waterford Miners' Memorial Centre, a volunteer organization which developed the "Urban Centre" in the former Paramount Theatre to house a variety of services and continues to run the Centre, explained the nature of the operation and the implications of the Town's financial support being cut back or withdrawn if the Town's financial position worsened.

The operating budget of the Centre is approximately $40,000.00 of which $20,000.00 comes from the Town. The building houses a branch of the Regional Library, the Homemakers Services, the Family Service office, senior citizens' quarters, pensioners' quarters and a United Mineworkers of America office, and has as well a mini-theatre, boardroom and small meeting room available for public use. If the Town cannot afford its financial support for the centre and the service organizations located there, Mr. Connors anticipated that those services might have to relocate which would leave the Centre without sufficient income to continue operating. If the Town had to revert to village status he was not sure that the Municipality would continue to support the Centre and the services operating out of it. Mr. Connors supported the annexation application whose success he considered vital to the ongoing service offered by the Centre and its tenant organizations.

Janet Wilcox, coordinator of Homemakers Services, made a presentation on behalf of the community Board of Directors of the New Waterford Homemakers Service Society, on the history of the service and its role in the community. The agency was the first established in Cape Breton. It is now one of seven, none of which are in the Municipality. It has been recognized as one of the leading agencies in the province, and has been used as a teaching agency. It has one of the highest caseloads in the province and is one of the very few homemaker agencies providing daily service to those in need. It has a staff of 11 homemakers and a total budget of $164,927.00, with 88.7% of the caseload in the Town and 11.3% in the Municipality (Scotchtown, River Ryan, New Victoria and Lingan). The Town's share of that budget is $9,977.00.

In the opinion of Ms. Wilcox, the Homemaker Service is essential to citizens of the Town and surrounding area because of the high ratio of citizens over the age of 65, the high ratio of persons on pre-retirement due to health-related problems, the high incidence of cancer in the area, the lack of "meals on wheels" and other home care facilities, a lack of other family resources and the low and fixed incomes in the area. The Homemakers Service Society supported the annexation application of the Town, as the Town had from the beginning supported this service.

Michael MacKinnon outlined the support which the Town has given to volunteer minor sports organizations in the development of recreational facilities and in grants to volunteer sports groups. Both facilities and organizations depend on the Town's financial support. Since the Town's current financial crisis may threaten this support, Mr. Mackinnon supported the annexation application.

Gerald Springall, a member of the Town police force for the past 8 years and president of the CUPE local which represents 53 of the 67 full time employees of the town, spoke on the potential impact on those Town employees if the Town "went bankrupt". He anticipated that the employees of the Town would lose their jobs if the Town's financial crisis was not remedied by the approval of the annexation application.

Hardy Watts representing the Board of Directors of the New Waterford and District Community Centre supported the annexation application because of the belief that the future of the Community Centre would be "seriously threatened" if the Town could not secure an assessment base to adequately support its needs. The Town supports the Community Centre with a full tax exemption. Its attempt in 1984 to reduce the annual exemption by an amount equal to one-third of the total, with the hope that the Municipality would contribute an amount equal to one-third because of the use made of the facility by residents of the Municipality, was unsuccessful. Mr. Watts was of the opinion that there was "a lot more at stake than just a mere transfer of local government responsibility from one municipal jurisdiction to another. If New Waterford is permitted to die then so will many of our community services."

Bill Williamson, a resident of Scotchtown, expressed the opposition of some ratepayers in District 5 of the Municipality to the Town's application for annexation. He had been chosen as spokesman at the first of several meetings of ratepayers in the district called by the Councillor. According to Mr. Williamson the "life expansion" of the Lingan Mines is a maximum of approximately 5 years. For that reason he believed that annexation would not produce a long-term revenue source for the Town. He was apprehensive that the local improvements such as street paving, curb and gutters which had been acquired in District 5 through area rates as a result of the Lingan-Phalen assessment base would come to an end if annexation were allowed. He felt that residents of the area proposed for annexation should be allowed to vote on the matter.

David Johnston, expert financial witness for the Town, gave rebuttal evidence reviewing the varying approaches, assumptions and conclusions of the analyses by Mr. Weedon, Mr. Cunningham and himself in anticipating the financial impact of annexation. His comparative analysis is contained in Exhibit N-42.

Mr. Johnston identified four topics covered by all three reports: the impact of "annexation failure" on the Town and the Municipality, the impact of annexation on the Province, the impact of annexation on the ratepayers of the annexed area, and the impact of annexation on the Town and the Municipality. He referred to Mr. Weedon's analysis as "the Doane Report", Mr. Cunningham's as "the County Report" and his own as "the Thorne Report". He compared in detail the variations in coverage of relevant matters in each report, analysing each under the headings of "minor items", "math error", "adjustment for undue hardship", "areas of agreement", "areas of disagreement", "assessment related items", and "resulting tax rates".

After analyzing each report he summarized their characteristics as follows:

"A. County Model - "The First Year Annexation Model"

- a model containing mathematical errors
- a model with unsupported assumptions concerning operating costs
- a model that portrays the first year of annexation only if that year happened to be 1986 (which it can't)
- a model that (for purposes of assessment related calculations) fails to recognize any value for the Phalen Mine
- a model that has locked in the value of Phalen Mine assessment at an unrealistic value of $6 million

B. Doane Model - "The Static Model"

- a model that contains most of the above limitations
- a model that fails to recognize the fact that the Town will lose a $250,000 grant

C. Thorne Model - "The Fully Implemented Model"

- a model that overlooks the transitory phases of implementing the annexation
- a model that adopts the reasonable view of

assessing the annexation within reasonable parameters"

In cross-examination Mr. Johnston responded to the contention that in his comparative analysis (Exhibit N-42) he was "the judge and jury" of his own report by saying that as author he felt that he was entitled to express his view [of his own report]. He agreed that he had not been "quite as explicit" as the Doane Report in detailing the impact of annexation on the ratepayers of the area proposed for annexation.

Following the hearing of this application briefs were submitted in early February by Counsel for the Town and the Municipality, followed by a rebuttal brief on behalf of the Town filed with the Board on February 13, 1987.

The Board is required to consider the factors set out in Sections 6 and 22(1) of the Act in coming to a decision on this application for annexation. Those sections state:

> "Section 6 Upon an application to the Board, the Board shall inquire into and take into account the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

> "Section 22(1) The hearing of the application shall be in accordance with the Municipal Board Act and the Board may, if satisfied that the order is in the best interests of the inhabitants of the area, taking into consideration the financial and social implications of the order applied for, grant the order of amalgamation or annexation."

The post-hearing brief submitted on behalf of the Town concludes:

"FINAL SUBMISSION

> It is submitted on behalf of the Town it has established:
>
> (a) a dire financial need for increased revenue and that it is facing imminent bankruptcy by reason of the withdrawal of provincial funding;
>
> (b) that it has immediate and long-term social requirements it finds impossible to satisfy;
>
> (c) that annexation will remove the threat of bankruptcy for the foreseeable future;
>
> (d) that the impact of annexation on the County will be minimal;
>
> (e) that the subject land is both economically and geographically situate so as to comprise a natural extension to the boundaries of the Town;
>
> (f) that the Town has and must continue to supply essential services to the Subject Area in order to continue and promote industrial growth therein; the Town should have a voice in future development within the Subject Area;
>
> (g) that historically the Town has been the bedroom for the mine workers in the general area, and is expected to provide services and amenities to these workers. The benefits which flow from the mines should accrue to the Town, not just the burden;
>
> (h) the evidence placed before the Board, on any fair appraisal, is overwhelmingly in favour of the Application."

The post-hearing brief submitted on behalf of the Municipality concludes:

"CONCLUSION

> Clearly, the onus is on the Town of New Waterford to establish a case on which the Board would approve its annexation application. On behalf of the Municipality of the County of Cape Breton we submit that the Town has failed to discharge this onus and its application should

accordingly fail.

The burden placed on the applicant is clearly spelled out in Sections 6 and 22 of the Municipal Boundaries and Representation Act as follows:

Section 6 - necessity or expediency

- the financial position and obligations of the municipalities affected

- the burden of taxation upon the ratepayers

- all other relevant matters

Section 22 - the best interests of the inhabitants of the area.

The Town of New Waterford has presented to the Board an application couched in terms of historical right, development control and financial need: but, the Town has admitted the fact that the application is simply a quest for money for the financially troubled Town. Historically, the County of Cape Breton has an equal, if not superior, claim to coal mining roots, as over the years 70 mines were located there. Services to the annexation area at best will be only slightly improved and this with the assistance of the Municipality of the County of Cape Breton through the New Waterford & District Water Commission. Development control in the area is a non-issue as 100% of the industrial land is owned by Crown Corporations and is being fully utilized. The Emperor has no clothes - the Town of New Waterford needs money and they have disguised their desire in the cloak of annexation.

In the Port Hawkesbury case the Board heard arguments on the poor financial position of the Town and the issue of emergency funding was raised. The Board responded, at page 28, as follows:

> " ... While it notes the record of special financial assistance which the Town has received from the Province over a number of years, the Board is aware that other Towns in Nova Scotia have been in similar circumstances (NSMB-2-83-MB, Town of Oxford, p.15) and does not consider this sufficient reason to justify an order for annexation..."

Prior Board decisions have established the premise that annexation will only be granted if the applicant satisfied the Board that all the questions raised in Sections 6 and 22 have been answered and that annexation is indeed the answer. Further, the Board has always placed great emphasis on the protection of the best interests of the inhabitants of the annexation area. Should New Waterford's application succeed, the inhabitants of the area can look forward to a minimal increase in services in return for a 50 - 100% increase in property taxes. This windfall profit gained through added assessment and higher taxes would be used to balance the Town's budget with very little increased service costs for New Waterford.

Who will benefit should the application succeed? The present Town residents will see their taxes decrease and the existing level of services maintained. The County of Cape Breton will be forced to increase its taxes by 4 - 6% or reduce its level of services to cover the $500,000.00 revenue loss. The inhabitants of the annexation area, both residential and commercial face tax increases of 50 - 100% with only minimal service increases. The Province of Nova Scotia will enjoy a decrease in its emergency funding budget. Therefore, the only parties adversely affected by a successful application are residents of Cape Breton County and particularly the inhabitants of the annexation area, be they residential or corporate.

The application by the Town of New Waterford must fail as the Town has not discharged its burden of proof. Planning and development are non-issues. The provision of services is minor. The inhabitants of the annexation area do not need the Town of New Waterford because they enjoy a level of services which will not be significantly improved while paying greatly increased taxes.

The Town has failed to establish any necessity or expediency for the annexation. New Waterford's financial woes began over 20 years ago and continue today. The threat of the discontinuation of Provincial emergency funding prompted the Town to bring this application while ignoring all other available avenues. Increased taxes, reduction of services and reversion to village status have all been discussed, but only discussed, and have been rejected without further study. The realities of politics preclude the first two alternatives while civic pride prevents rational consideration of the third. There is no evidence that services presently enjoyed by New Waterford residents would deteriorate should the Town revert to village status. Nor is there any evidence of decreased property values or loss of employment. The application must be viewed as a desperate plea for money by a Town facing difficult financial decisions. Must the residents of Cape Breton County be required to provide the solution to the Town's problems?

> In conclusion, it is submitted that the Town of New Waterford has failed to establish a case to support their application. They have failed to show necessity or expediency and they have disregarded the interests of the annexation area's inhabitants.
>
> Granting this application would place a tax burden on the residents disproportionate to the increased services to be received. The inhabitants have indicated unanimous opposition to the application and have expressed complete satisfaction with the Municipality of the County of Cape Breton. The Town of New Waterford must explore alternate solutions. To grant this application sets in place a dangerous precedent which threatens not only Cape Breton County, but all municipal units which have had the good fortune to experience growth in recent years."

The grounds for the annexation cited in the application by the Town (Exhibit N-1) were as follows:

> "(a) That the Subject Area is part of the economic and serviceable area as the Town of Waterford and should be part of the Town of Waterford;
>
> (b) That the Town of New Waterford is prepared extend all municipal services reasonably required or feasible within the Subject Area and to control the development of the Subject Area and its relationship to the Town of New Waterford;
>
> (c) That the Town of New Waterford presently lacks industrial assessment and sufficient suitable area industrial development and the acquisition of Subject Area would provide the Town of New Waterford with an industrial base and suitable land for industrial development.
>
> (d) That the Town of New Waterford wishes to have Subject Area within its boundaries so that the Town New Waterford shall have within its control the orderly, planned and desired development of the Area.
>
> (e) That existing development and future development within the Subject Area has and will impact upon environment, infrastructure and economy of the Town of New Waterford and accordingly the Town of New Waterford should have control over the land use and other planning of the Subject Area.

> (f) That development in the Subject Area is and will be serviced through the Town of New Waterford water and sewer systems, and accordingly the Town of Waterford should obtain the tax revenue from such development to compensate the Town of New Waterford for the impact on its services and its economy".

Of the statements contained in the grounds for the application cited above, the Board believes only two have relevance to the factors which the Board must consider in determining whether the annexation should be granted. Those are:

> "(b) That the Town of New Waterford is prepared to extend all municipal services reasonably required or feasible within the subject area".......
>
> "(c) That the Town of New Waterford presently lacks industrial assessment ... and the acquisition of the subject area would provide the Town of New Waterford with an industrial base..."

With reference to the other grounds cited by the Town:

(a) The contention that the subject area is part of the same economic and serviceable area as the Town and [therefore] should be part of the Town does not establish the necessity of annexation in the opinion of the Board, and in itself does not establish expediency.

(b) The contention that the Town is prepared to control the development of the subject area was offset by evidence that the vast majority of the 1300 acres in the subject area is owned by DEVCO or the Nova Scotia Power Corporation, neither of which are considered to be subject to municipal controls.

(c) The contention that the acquisition of the subject area would provide the Town with suitable land for future industrial development was at variance with letters from DEVCO and the Nova Scotia Power Corporation submitted in evidence which gave no indication that either corporation considered that it had lands surplus to its needs which could be conveyed to the Town or private sector interests.

(d) The contention that the Town could control the orderly, planned and desired development of the subject area applies only to those privately owned lands which form a very small part of the subject area.

(e) The contention that "existing development and future development within the subject area was and will impact upon the environment, infrastructure and economy of the Town" may well be true, but the Town's ability to control the land use and other planning of the area proposed for annexation, would be minimal, in the Board's opinion, because the majority of the area is in the control of two crown corporations.

(f) The contention that "development in the subject area is and will be serviced through the Town of New Waterford water and sewer systems and accordingly, the Town ... should obtain the tax revenue from such development to compensate the Town .... for the impact on its services and its economy" contains two fallacies: that development will occur in the subject area and that water service would be provided by the

Town itself rather than by the New Waterford and District Water Commission. Development in the subject area may occur. Very limited development could be possible on the lands in private ownership. The lands owned by the two crown corporations appear to be already sufficiently serviced for their existing needs and no change in their use or intensity of use was indicated in evidence. The provision of water services is not the responsibility of the Town but of the Water Commission, and any impact of extension of services would be experienced by customers of the utility, one-third of whom are residents of the Municipality.

Counsel for the Municipality argues that the onus is on the Town to establish a case to justify the Board's approval of its annexation application. It is his submission that the Town has failed to discharge this onus and its application should accordingly fail. In support of this position he quotes from a 1984 decision by the Board on an application for annexation by the Town of Bridgewater at p.21 of Volume Three-B/1984 of the Board's decisions:

> " The burden of proof is indeed on the Town to justify by information and argument the "necessity or expediency" of the annexation applied for."

The Board believes that a primary responsibility does lie with the applicant(s) for annexation to adduce evidence to justify the necessity or expediency of the annexation and to adequately set out the financial position and obligations of the municipalities affected and the burden of taxation on the ratepayers. The Board however has the responsibility to weigh the evidence of all the parties to the application and to consider it in the light of those factors contained in Section 6 of the Act and additionally to satisfy itself that the order is in the best interests of the inhabitants of the area, taking into consideration the financial and social implications of the proposed annexation, as set out in Section 22(1) of the Act. The burden of justifying an annexation is not a unilateral responsibility.

The Board then must determine whether the annexation proposed by the Town of New Waterford is necessary or expedient; it must inquire into the financial position of the municipalities affected and their financial obligations; it must take into account the burden of taxation upon the ratepayers; and it should satisfy itself that the order is in the best interests of the inhabitants of the area, taking into consideration the financial and social implications of the proposed annexation. Having considered the application for annexation in the light of these factors, the Board is empowered by Section 22(2) to ".... annex a greater or smaller area or areas than the area or areas specified in the application".

From the evidence previously cited in this decision the Board has no difficulty concluding that the proposed annexation is expedient for the Town, given its financial state and obligations. Whether annexation is a necessity for the Town is less clear. The Municipality suggests that the Town has other options to remedy its financial condition much less drastic than annexation: reverting to village status, or dissolution of the Town, or the transfer of some of its service responsibilities to Jointex. The Town appears to have rejected these other options or perhaps to have given them a lower priority than annexation, its preferred solution to its financial difficulties. Town pride in its history and past accomplishments make that choice understandable.

The evidence adduced at the hearing of this annexation application frequently circled about four intangibles. Would DEVCO continue its voluntary policy of paying grants in lieu equal to full commercial taxation of its properties even if a change of Municipal boundaries increased those payments for the Lingan and Phalen mine properties by 50%? Would the Province eventually revert to adequate emergency funding for the Town as its neighbour the Town of Glace Bay apparently still continued to enjoy? Would approval of the Town's proposed annexation lead other industrial Cape Breton towns in poor financial circumstances to do likewise, thus further damaging the financial capabilities of the Municipality? Would regional co-operation, involving the sharing of industrial revenues on a regional basis, solve the financial problems of the Town, and if so was there the time and the will to implement such changes in structure before the Town was confronted with "bankruptcy"?

The answers to these questions differed according to the perspective of the responding Municipality. Neither DEVCO nor the Minister participated in the hearing and so their response to the questions which concern them is unknown.

The Board does not doubt that the outcome of this annexation application will have an impact on all the municipal units in the industrial Cape Breton area. For that reason the absence of players with a major financial role in the area such as DEVCO and the Province was unfortunate. The Board finds it difficult to believe that these major players who will benefit or suffer from the outcome of this proposed annexation are disinterested in its result. Interested though they may be, they chose not to participate, thereby depriving the Board and the parties involved of factual and opinion evidence highly relevant to the central issues in this matter.

Notwithstanding these unknowns, the Board must consider the evidence and argument and come to a determination on a question which has wide ramifications but a central core: is there sufficient merit in the Town's annexation application, considering its impact on the Municipality and the private and corporate inhabitants of the area, to justify its approval? The Board has concluded that annexation is justified although for a more limited area than that for which the Town applied.

The Board finds from the expert financial evidence adduced that without an augmented assessment base the Town would face the necessity of a tax rate increase of approximately 50% in 1987 because of the discontinuance of emergency funding and the special capital grant used for operating expenses, and because of the shortfall in emergency funding experienced in 1986. Conversely annexation would have the impact of a tax increase for the Municipality in 1987 of approximately 3 - 4%. The Board considers the impact of the refusal of the proposed annexation on the Town to be quite disproportionate to the impact of the approval of the annexation on the Municipality.

Nevertheless approval of the application would have an effect on the ratepayers in the subject area. From the evidence it appears that the Town chose the boundaries of the area it applied to annex to exclude as many residential properties as possible. The Town has indicated that it is willing now to exclude the residential properties included in its application if those ratepayers are opposed to their inclusion within the Town's boundaries. A petition filed by the District Councillor representing the area indicates opposition to annexation by residents within the boundaries of the proposed annexation area.

The privately owned lands in the subject area three rough "blocks", two of which abut the eastern boundary of the Town and the third is located in a relatively isolated area on the County Road surrounded by lands of DEVCO and the Nova Scotia Power Corporation. The more southerly of the blocks abutting the Town boundary consists of eight parcels of undeveloped land which taken together have a common boundary with lands of DEVCO and other privately owned lands in the MacLellan Heights Subdivision. The more northerly of the "blocks" adjacent to the

Town boundary contains a number of homes and a mobile home park. Some of these parcels extend northerly to the Atlantic Ocean; this "block" is roughly bisected by the County Road running east and west. The third isolated "block" consists of three parcels only one of which has an occupied residence.

The Board heard evidence that these privately owned lands would be "land-locked" (from other lands in the Municipality) if the annexation application was approved excluding them. The Board agrees. The Board will order that they form part of the annexation area together with a mechanism to phase in the tax increase which will result from the difference in tax rates between the Town and the Municipality. The Board believes that the ratepayers affected deserve some cushioning from the financial impact of annexation, recognizing that their opposition to annexation may have been based on the financial consequences which they anticipated they would experience. While the Municipality could perhaps provide the services which the remainder of District 5 enjoys to those three "blocks" of privately owned land within the subject area, their geographical location appears to make this cumbersome and uneconomic. In addition the exclusion from annexation of the privately owned lands which lie adjacent to the Town boundary would leave only a very small portion of the subject area contiguous to the Town boundary which would appear to the Board to result in a very illogical configuration of the lands approved for annexation.

The Board will approve the annexation by the Town of the lands of the Cape Breton Development Corporation and the lands in private ownership, but not the lands of the Nova Scotia Power Corporation. The DEVCO lands represent a very sizeable commercial assessment and the grants in lieu paid by DEVCO to the Municipality have been identical to the amount of taxation which would be paid by a private industrial enterprise. The assessment of the lands of the Power Corporation however represents no significant income source to the municipality in which it is located because the grants in lieu for the Lingan generating station are distributed to various municipal units in the area according to a formula set out in legislation and so are unaffected by the success or failure of annexation. The Board heard evidence that the Power Corporation does not consider any of their lands to be surplus to their requirements. At this time there appears to be no likelihood that those lands will revert to private ownership and so generate tax income for the municipal unit in which they are located.

Annexation by the Town of the DEVCO lands and those in private ownership in the subject area will impact on the revenue requirements for the area rate levied in District 5 of the Municipality. The Town assumed that it would provide a subsidy to District 5 to stabilize the district rate. The Board will order that compensating grants be paid by the Town to the Municipality for this purpose.

The Board partially approves the annexation application of the Town. The income which may be derived from the DEVCO mines is at the very least expedient and may be necessary for the financial survival of the Town. The financial position of the Town if annexation is not granted will be a great deal worse than the financial position of the Municipality if annexation is granted. The financial obligations of the Town do not appear to be excessive but do appear to be difficult if not impossible to meet unless annexation is granted. The Municipality is in a better state to meet its financial obligations in comparison to other municipalities than the Town is in comparison to other Towns, understanding that municipalities are relieved of the costs of some services (policing, transportation) which towns must bear. The burden of taxation on the ratepayers of the Town may be marginally reduced from current levels as the result of annexation, while the tax rates in the Municipality may increase by 3 - 4% thus slightly increasing the burden of taxation on ratepayers in the Municipality. Without annexation the burden of taxation on the ratepayers of the Town would have almost doubled, while the burden of taxation on the ratepayers of the Municipality was forecast to have decreased slightly.

The annexation approved by the Board is in the best interests of the inhabitants of the Town primarily, but it can be argued that it is also in the best interests of a wider area.

The Municipality surely cannot maintain the view that the contrast between the dire straits in which the Town finds itself and the healthy financial prospects of its neighbour the

Municipality will advance the Municipality's stated aim of regional co-operation and sharing. It seems probable that without annexation the Town will founder if the Province continues to refuse to come to its financial rescue. The Municipality which surrounds it has benefitted and will continue to benefit from the services which the Town supports directly, and from those services which enjoy the Town's more advantageous cost-sharing ratio. There may be economic and/or philosophical reasons why the Municipality does not offer comparable services, but its residents who receive the benefits could stand to lose if the Town's financial crisis deepens.

The inhabitants of the area to be annexed will be shielded from the full immediate impact of tax rate increases. The inhabitants of District 5 will benefit from transitional grants which will help stabilize the district area rate.

The social implications of this annexation are diverse. The Board believes on the evidence that the social implications of the annexation are beneficial primarily for the inhabitants of the Town but also for the inhabitants of the surrounding area who are able to use facilities and services principally supported by the Town.

Having considered the evidence and argument of the parties and those who attended the hearing on this application, the Board for the reasons stated above, approves the annexation by the Town of New Waterford of the lands of the Cape Breton Development Corporation and of those lands in private ownership located within the boundaries of the lands proposed for annexation by the Town, presently located in the Municipality of the County of Cape Breton.

The Board will order that the Town prepare and submit a metes and bounds description of the area approved for annexation.

For the purposes of completing the assessment roll as required by Section 64 of the Assessment Act, R.S.N.S., 1967, Chapter 14, and for the purposes of the review of municipal polling districts as required by Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, Chapter 10, the annexation will be effective December 1, 1987. For all other purposes the annexation will be effective January 1, 1988.

The Board will order pursuant to Section 44(f) of the Act that the Town pay compensating grants to the Municipality to stabilize the District 5 area rate commencing in 1988 with a payment of $18,800.00, an amount to be reduced by 20% in each succeeding year of the next five years until 1992.

The Board will order pursuant to Section 44(h) of the Act that the Town pay compensating grants, as it had volunteered, to the owners of lands in the annexation area classified as residential or resource property if those ratepayers held title to their lands on the date of the issuing of this decision. The grants will commence in 1988 and run for 5 years. In 1988, qualifying ratepayers will receive a grant from the Town equal to 100% of the difference between the Town's 1986 residential tax rate and the Municipality's 1986 residential and area tax rate for District 5. The grant will be reduced by 20% in each succeeding year of the next 5 years.

The Board will order that the Town submit information on the boundaries and current population in the Town's existing wards together with a recommendation on the ward or wards to which the annexed area should be added.

On the matter of costs, Counsel for the Municipality in his post-hearing brief stated:

> " Finally, the Municipality of the County of Cape Breton seeks the costs of this action pursuant to Section 22 of the Municipal Board Act, Stats. N.S., 1981, c.9. In the Shelburne case the Board dealt with the issue of costs and stated that costs would be awarded if the application was vexatious, frivolous or in bad faith. It is submitted that the Municipality of the County of Cape Breton is entitled to costs, as the New Waterford application has no merit and consequently is vexatious and frivolous."

The Board believes the Town's application has merit. It is not vexatious or frivolous and it has succeeded in part. The Town did not seek costs. Pursuant to Section 22(2) of the Municipal Board Act, the Board will award as costs to the Municipality the disbursements necessarily incurred for the services of its expert witness Mr. Peter Weedon on a party and party basis on the County Court scale, to be taxed by Michael Whalley, Q.C. of Sydney.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of September, A.D. 1987.

E A Salton

ELIZABETH SALTON
Member
Nova Scotia Municipal Board